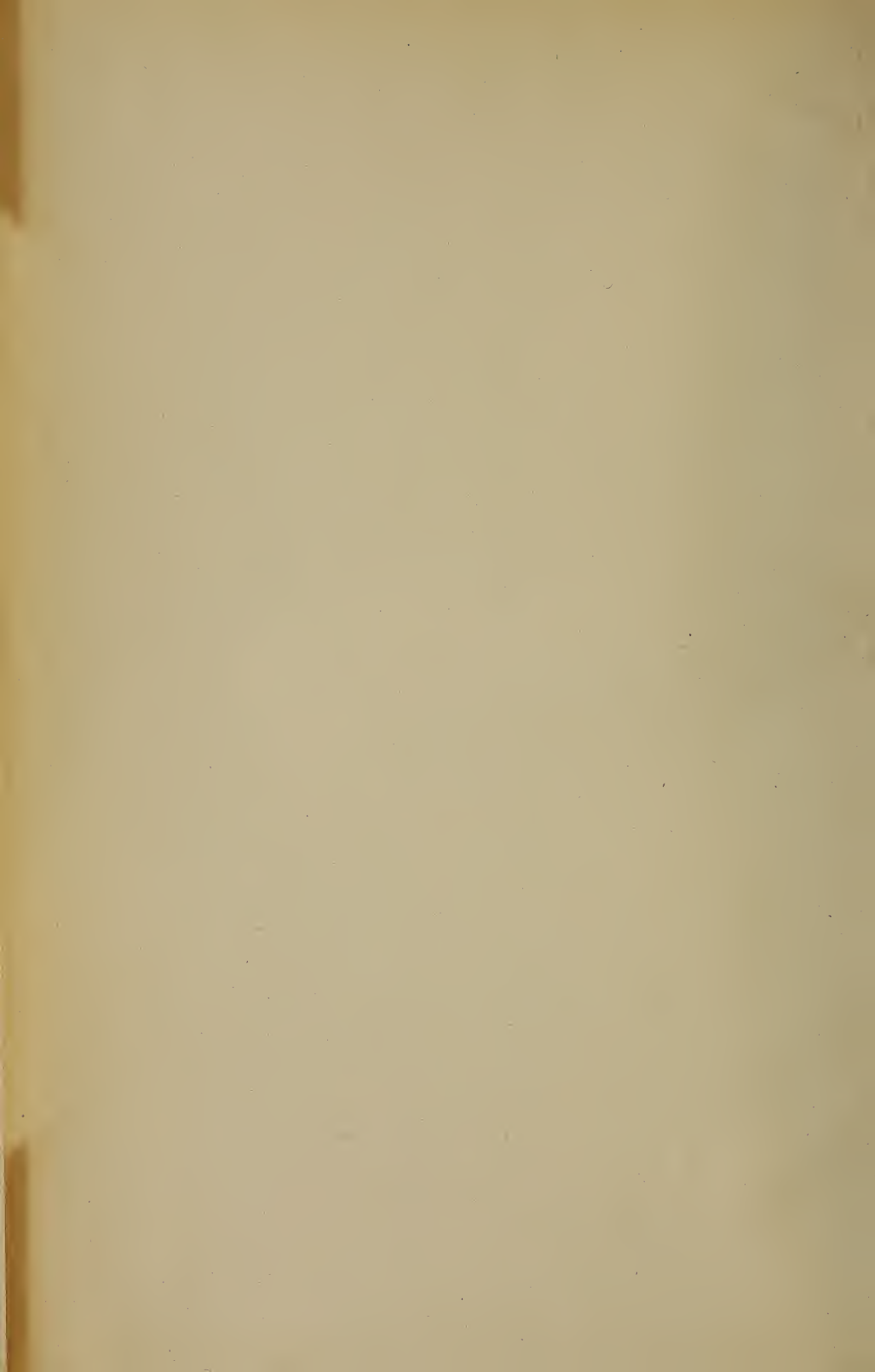


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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1915-1916

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1916

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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

- " " JAMES THOMPSON GARROW, J.A.
- " " JOHN JAMES MACLAREN, J.A.
- " " JAMES, MAGEE, J.A.
- " " FRANK EGERTON HODGINS, J.A.

Second Divisional Court.

(1915)

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.

- " " WILLIAM RENWICK RIDDELL, J.
- " " FRANCIS ROBERT LATCHFORD, J.
- " " HUGH THOMAS KELLY, J.
- " " JAMES LEITCH, J.

Second Divisional Court.

(1916)

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P.

- " " WILLIAM RENWICK RIDDELL, J.
- " " HAUGHTON LENNOX, J.
- " " JAMES LEITCH, J.
- " " CORNELIUS ARTHUR MASTEN, J.

HIGH COURT DIVISION.

(1915)

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“ “ WILLIAM EDWARD MIDDLETON, J.

“ “ HUGH THOMAS KELLY, J.

MEMORANDA.

CALL TO THE BAR.

In Hilary Term, 1916, the following gentlemen were called to the Bar:—

(20TH JANUARY.)

Henry Jodoin, K.C. (of the Quebec Bar.)

(10TH FEBRUARY.)

Oswald Alexander Lauzon, James Earl Lawson, Cecil Johnstone Bovaird, Joseph Warner Murphy.

In Easter Term, 1916, the following gentlemen were called to the Bar:—

(20TH APRIL.)

Paul Leduc.

(20TH MAY.)

Dilly Benjamin Coleman, Albert Hawley Boddy, Charles Bowman, Sheldon Lapierre Smoke, John Callahan, William Stanley Maguire, James Grey Hamilton, John Ferguson Twigg, Alfred Richardson Quirk, Bruce Victor McCrimmon, Frank Walker Callaghan, Howard Armour Harrison, Harvey Basil Settrington, Arthur Lorne Reid, Thomas Basil Richardson, Harry Nelson Barry, Florance Charles O'Leary, Arthur Scott Winchester, Joseph Max Bullen, Wilfrid Daniel Roach, Walter Benjamin Cowan, Percy Shulman, John Clarke Thomson, Frederick Harold Vanston.

ERRATA.

Page 142, 13th line from bottom, delete "648" and put "548" after
"32 O.L.R."

Page 158, 13th line from bottom, for "2 B. & P." read "3 B. & P."

Page 334, 14th line from bottom, for "*Smith*" read "*Scott*."

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REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT OF ONTARIO
(APPELLATE AND HIGH COURT DIVISIONS).

[MASTEN, J.]

LINSTEAD V. TOWNSHIP OF WHITCHURCH.

1915
Nov. 25.

Highway—Nonrepair of Bridge—Collapse under Weight of Traction Engine—Death of Person Seated on Engine—Liability of Township Corporation—Municipal Act, 3 & 4 Geo. V. ch. 43, sec. 460 (1)—Notice or Knowledge of Defects—Traction Engine Act, 2 Geo. V. ch. 53, sec. 5 (4)—Failure to Comply with Requirements of—Absence of Causal Connection between Failure and Accident.

The defendants, a township corporation, were *held* liable, under sec. 460 (1) of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43, for the death of a person on the 1st August, 1913, which was found to have occurred in consequence of the disrepair of a bridge forming part of a highway in the township. The bridge gave way under the weight of a traction engine upon which the deceased was seated, engaged as a volunteer in steering it, while the owner stood beside him on the engine regulating the speed of the engine, which was being propelled slowly along the highway and upon the bridge.

A statutory obligation having been imposed on the defendants, together with a liability for all damages sustained by any person by reason of default, the question of notice to or knowledge of the defects by the corporation was, in the circumstances of the case, immaterial; but, if notice was necessary, the defendants had, as early as 1911, adequate notice of the disrepair into which the bridge had fallen.

Upon the evidence, it could not be found that, if planks had been laid down by the deceased or the owner of the engine, before propelling it upon the bridge, in compliance with the Traction Engine Act, 2 Geo. V. ch. 53, sec. 5, sub-sec. 4, the bridge would not have fallen; and to make the failure to comply with the requirements of the statute a defence, it must be shewn that there was a direct causal relation between such failure and the accident which followed.

The effect of the statutory requirement that there be laid down "planks of sufficient width and thickness to fully protect the flooring or surface of such bridge or culvert from the contact of the wheels of such engine," 2 Geo. V. ch. 53, sec. 5, sub-sec. 4, considered; and *Goodison Thresher Co. v. Township of McNab* (1908-10), 19 O.L.R. 188, 44 S.C.R. 187, distinguished.

ACTION by a widow, under the Fatal Accidents Act, to recover damages for the death of her son by reason of the defendants' breach of duty in failing to keep in repair a bridge forming part of a highway in the township of Whitchurch.

November 2, 3, 4, and 5. The action was tried by MASTEN, J., without a jury, at Toronto.

1915

LINSTEAD
v.
TOWNSHIP
OF WHIT-
CHURCH.

T. Herbert Lennox, K.C., for the plaintiff.

W. M. Douglas, K.C., and *James McCullough*, for the defendants.

November 25. *MASTEN, J.*:—This is an action brought by Sarah Jane Linstead against the Corporation of the Township of Whitchurch to recover damages for alleged breach of duty on the part of the defendants in failing to maintain in proper repair a bridge on the highway known as the Bogarton road, situate in the defendant township.

The plaintiff, who is a widow, alleges that such want of repair resulted in the death of her son, Walter Linstead; and, no personal representative having been appointed, she brings this action on behalf of herself as the sole beneficiary of the said Walter Linstead, under the statute.

The defendant corporation set up two main defences:—

(1) That the bridge in question was, shortly before the accident, regularly and thoroughly inspected on behalf of the defendants and reported sound, and that the defendants had no notice of any want of repair in connection with the said bridge.

(2) That the deceased Walter Linstead, when he met his death, was crossing the bridge in question on a traction engine, and that it was the duty of the deceased, before attempting so to cross the bridge, to lay down planks as required by the statute known as "The Traction Engine Act," 2 Geo. V. ch. 53, sec. 5; that, as the deceased failed to lay down planks, he was illegally on the bridge, and the plaintiff cannot recover.

The facts are shortly as follows:—

On the 1st August, 1913, the deceased Walter Linstead had been in the employ of George Drury at his farm in Whitchurch, where Lemuel A. Pipher had, during the same day, been operating his steam-thresher. Threshing was concluded late in the afternoon, and at about 6 o'clock in the evening Pipher, with his traction engine and thresher attached, left George Drury's farm on his way to his next assignment. It chanced that his route lay in the direction of the home of the deceased Walter Linstead, and the latter, therefore, mounted the front platform of the tractor, and at the time when the accident occurred was actually engaged as a volunteer in steering it, while Pipher stood beside him regulating the speed of the tractor. At the time of the acci-

dent the tractor is said to have been travelling at about the rate of one mile per hour. No criticism is made by the defendants of the rate of speed of the motor, nor of the method of steering.

Shortly after leaving Drury's farm, the tractor entered the highway, and, travelling in a westerly direction, it attempted to cross the bridge where the accident occurred. It had safely crossed this bridge on the morning of the same day when coming to Drury's farm, and at the time when the bridge collapsed it had, after passing wholly upon the bridge, partly crossed to the westerly side. The front wheels were over on the westerly bank about five and a half feet, and the rear wheels were still on the bridge, about two and a half feet from the westerly abutment. At this juncture the bridge suddenly gave way. The tractor was precipitated some 10 or 11 feet to the bottom of the shallow stream over which the bridge passed. The steam-couplings of the engine are said to have broken, and Walter Linstead was found dead, probably from being scalded by the escaping steam.

The bridge in question was a wooden structure, which had been built from 17 to 20 years. The abutments consisted of square cedar timber, 8 by 8. The support of the floor of the bridge consisted of 5 cedar stringers, 6 by 8. These stringers rested on the abutments into which they were partly set. Across these stringers were laid planks 12 feet long and from 4 to 5 inches in thickness. The span of the bridge was about 10 feet, and the depth from the bridge down to the stream below, from 9 to 11 feet. There were three or four inches of dirt on top of the planks forming the surface of the bridge. The top surface of the bridge so covered with dirt was from $2\frac{1}{2}$ to 3 inches lower than the travelled surface of the highway east and west of the bridge. The stringers broke at the abutments at both the east and west side of the bridge, and the whole bridge took a drop to the bottom of the stream below. A subsequent examination of the stringers of the bridge shewed that the stringers were more or less rotted at both ends, and that they were all in substantially the same condition.

In June, 1911, the bridge was examined by George Drury, who was then pathmaster over the Bogarton road, including this bridge. In that year he made certain repairs to it by putting in a plank on the west side. He examined the bridge at or about

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that time along with his assistant, one John Williamson, and, through Williamson, sent a notification to Samuel Foote, the then Reeve of the township, which he says made it very clear that the bridge was unsafe, and that it ought to have attention. Drury says that in order to fix the bridge he would have been compelled to replace it with a new one. He is confirmed as to its condition by John Williamson, who recollects inspecting the bridge along with Drury, and says that he told Foote that those two bridges (which included the one in question) needed fixing; and Foote, the Reeve, said he would look after it. Albert Flin-toft, who lives near the bridge, examined it carefully in 1911, when he was fishing, as he noticed that it shook when people were passing over it. At that time he examined two or three of the stringers at both ends and found them rotten, and he afterwards told Howlett, the pathmaster who succeeded Drury, about this and another bridge which were unsafe.

For the defence, Thomas J. Spalding says that in the month of May, 1913, prior to this accident, he and one Baker were on a tour of inspection of bridges of the township, and they examined the bridge in question and got under it for that purpose, and found it, so far as their examination proceeded, to be in good condition.

For convenience, I make certain findings of fact supplementing the above narrative.

The engine in question did not exceed 10 tons in weight; its actual weight, according to the evidence, was 17,075 pounds. The engine was carefully and properly driven upon and over the bridge so far as it went. There was no breach by the persons in charge of the engine of any duty incumbent on them in regard to the driving of the engine over the bridge, except a breach of the duty imposed by the statute requiring the placing of planks upon the bridge before running the engine over it.

I find that the bridge was in a condition of disrepair, the stringers having rotted to a considerable extent at both ends, and that the bridge in consequence was inadequate and insufficient for the carrying of the traffic entitled to pass over it.

I find that the damages to the plaintiff arose in consequence of the disrepair of the bridge. The accident happened by reason of the stringers giving way under the weight of the engine, and this collapse was owing to the rotten condition of the stringers.

The obligation of the defendant municipality is created by the Municipal Act, 3 & 4 Geo. V. ch. 43, assented to on the 6th May, 1913. Section 460, sub-sec. 1, of that Act, reads as follows: "Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall be liable for all damages sustained by any person by reason of such default."

Having regard to the last clause of this section, I am of opinion that a statutory obligation having been imposed on the municipality, together with a liability for all damages sustained by any person by reason of default, the question of notice to or knowledge of the defects by the corporation is, in the circumstances here shewn, immaterial. I refer to *City of Vancouver v. Cummings* (1912), 46 S.C.R. 457; *City of Vancouver v. McPhalen* (1911), 45 S.C.R. 194; *McClelland v. Manchester Corporation*, [1912] 1 K.B. 118.

But, if notice is necessary, I find that the defendants had, as early as in 1911, adequate notice of the disrepair into which the bridge had fallen. The fact that officials of the township inspected the bridge in May, 1913, without appreciating its defective condition, cannot, in my opinion, operate to relieve the defendants of liability.

I come now to deal with the second ground of defence above mentioned, namely, the failure to lay down planks on the bridge before attempting to run the traction engine over it. A similar question was considered in 1908 by Mr. Justice Anglin in the case of *Goodison Thresher Co. v. Township of McNab* (1908-9), 19 O.L.R. 188, and was ultimately determined by the Supreme Court of Canada in December, 1910. The decision is reported in 44 S.C.R. 187.

The statutory provision as it then stood is set forth in the Supreme Court report at p. 190. Before the present cause of action arose, this statute was re-enacted with certain amendments, and is to be found (as it stood on the 1st August, 1913) in 2 Geo. V. ch. 53, sec. 5, sub-sec. 4. I have, for convenience of reference, brought together in parallel columns the statute applicable to the *Goodison* case, and the statute applicable to this case.

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Section 10, sub-sec. 3 (with amendments as it stood in 1908).

"The two preceding subsections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the subsections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting to the flooring or surface of such bridge or culvert as aforesaid. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60."

2 Geo. V. ch. 53, sec. 5, sub-sec. 4 (1912).

"Before crossing any such bridge or culvert the person proposing to run any traction engine shall lay down on such bridge or culvert planks of sufficient width and thickness to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine; and in default thereof the person in charge and his employer, if any, shall be liable to the corporation of the municipality for all damage resulting to the flooring or surface of such bridge or culvert. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60. *Amended.*"

I have anxiously compared the statutory provisions above quoted, with the view of determining whether they effect a change in the law as it was determined in the *Goodison* case. While I think that the alterations in phraseology indicate a tendency or inclination on the part of the Legislature to alter the law as it was determined by the six Judges who pronounced the

decision in that case, and to make it accord with the view entertained by the five Judges who held the opposite opinion, I am by no means clear that the Legislature have, by the words used in the amending statute, given such clear expression to the supposed desire as enables the Court to declare that any change in the law had been effectively made. It turns out, however, that a determination of this question is unnecessary, because the point next to be mentioned seems to me decisive.

I am unable, in the present action, to justify a finding of fact similar to that made by Mr. Justice Anglin in the *Goodison* case. He found (19 O.L.R. at p. 200) that "the use of planks by Jones when crossing the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety."

From the evidence in the present case it appears that, if Pipher had laid across this bridge elm planks 3 inches thick and 14 feet long, so that the ends rested on the elevation of the highway east and west of the bridge, and so that the planks reached from one side to the other as an independent superstructure $21\frac{1}{2}$ inches clear above the surface of the bridge proper, the sustaining power of the stringers supporting the bridge might have been supplemented sufficiently to have obviated the accident. But I find no statutory obligation to lay planks 14 feet long or of any other particular length. The omission in the statute of any reference to the length of planks appears to me to be significant.

Considering then that all the statute requires is, that there be laid down "planks of sufficient width and thickness to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine;" considering that nothing is said about the length of the planks, and that short planks, 3 or 4 feet long, placed end to end, would have fully protected the flooring and surface; considering that such planks might have been of cedar or hemlock or basswood; considering that planks of such length and quality would not have strengthened in any way the carrying powers of the stringers that collapsed—I am unable to find that, if such planks had been laid in compliance with the statute, the bridge would not have fallen, and I think it probable that planks complying with all the requirements of the statute could have

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been put down without obviating the accident. But, in the circumstances, opinion on the matter is necessarily speculative. How speculative may be realised when it is remembered that this engine had safely passed over this bridge on the morning of the accident; that, immediately before the collapse, the bridge had successfully carried the whole weight of the engine, and that at the moment (2 or 3 seconds later) when the bridge fell, it was carrying much less than the engine's full weight. All I can say is, that the evidence does not satisfy me that the absence of planks caused the accident, or that the breach of the statutory duty to lay down planks was its immediate cause. In making these observations, I am bearing in mind the fact that the evidence indicated that the surface of the bridge was somewhat rough and uneven, and that the use of planks would have minimised the jolting of the traction engine, but there is no evidence of any particular impact or jolt giving rise to the fall of the bridge.

To make the failure to comply with the requirements of the statute a defence, it must be shewn that there was a direct causal relation between such failure and the accident which followed: *Walker v. Village of Ontario* (1901), 86 N.W. Repr. 566; *Sutton v. Town of Wauwatosa* (1871), 29 Wis. 21; *Welch v. Town of Geneva* (1901), 85 N.W. Repr. 970.

In my view, this finding of fact differentiates the present action from the principle of the *Goodison* case as determined in the Supreme Court of Canada, because the Judges in that case all base their judgments upon the finding of Mr. Justice Anglin, which I have already cited. At p. 192, Mr. Justice Davies says: "The two findings must be read together. That which holds the stringers of the bridge to have been inadequate to bear the weight of the engine when carried over the bridge without compliance with the statutory conditions is neutralised by the holding that compliance with the conditions would have ensured safety." Mr. Justice Idington, at p. 193, says: "The finding of fact that if the bridge in question had had the planks laid upon it by appellant as required by the statute, it would have been of sufficient strength to have ensured safety, seems to me to be an impassable barrier to the appellant herein." And Mr. Justice Duff, at p. 194, says: "I think the action should be dismissed because I think the findings of the learned trial Judge shew that

mishap was caused by the failure of the plaintiffs' servants to perform the conditions under which alone they were entitled to take the engine upon the bridge."

The result therefore is, that there was a breach by the defendants of their statutory obligation to keep the bridge in repair, which was the primary cause of the accident. There was reciprocal statutory obligation imposed on the driver of the engine to lay down planks before running the engine over the bridge. If the evidence disclosed that the breach of this latter obligation was the immediate cause of the accident, the *Goodison* case would govern, unless the statute has been effectively altered; but, as my finding is otherwise, I think that the present action is not governed by the *Goodison* case; and, consequently, that both defences of the defendants fail, and that the plaintiff is entitled to judgment.

This conclusion renders it unnecessary for me to consider or discuss the question raised at the trial as to whether Walter Linstead is within the words of the Traction Engine Act, that is, whether he was "a person proposing to run any traction engine" over the bridge, he being a volunteer or passenger travelling over the highway on the engine which was in charge of Pipher.

I assess the damages at \$1,400. Costs will follow the event. Judgment accordingly.

[APPELLATE DIVISION.]

ROBINSON v. MOFFATT.

Vendor and Purchaser—Agreement for Sale of Land—Vendor's Lack of Title—Knowledge of Purchaser—Failure to Repudiate Promptly—Approbation—Tender of Balance of Purchase-money and Mortgage Executed by Purchaser—Refusal of Vendor—Infancy of Purchaser—Want of Knowledge of Vendor—Inability to Create Valid Security on Land—Condition Precedent—Rescission—Conduct of Infant Purchaser—Assumption of Ownership—Specific Performance—Costs.

A purchaser may, on discovering the vendor's lack of title, repudiate the contract of purchase and sale; but he must do so with reasonable promptness. Where the purchaser knew of the defect, and thereafter himself tried to sell the land, made payments on it, tendered a mortgage made by himself upon it, and in all things acted as though the contract was valid, it was *held*, that it was not open to him to repudiate on the ground of the vendor's lack of title.

The vendor must be in a position to make a good conveyance at the date fixed for completion—a conveyance by himself and not another.

Murrell v. Goodyear (1860), 1 D. F. & J. 432, and *In re Bryant and Birmingham's Contract* (1890), 44 Ch.D. 218, followed.

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The plaintiff, who at the time of the contract and of the commencement of this action was an infant, entered into a contract with the defendant, who was not aware of the infancy, for the purchase of certain land; the plaintiff knew that the defendant was not the owner of the land, but that his rights were those of a purchaser under an agreement upon which payments were to be made; with this knowledge the plaintiff made payments on account of the price to the defendant; and, while still an infant, tendered to the defendant money sufficient to make up fifty per cent. of the purchase-price and a mortgage on the land executed by himself, and asked for a deed of the land, in accordance with a provision in the contract. The plaintiff made an affidavit that he was over 21 years of age, although he knew that he was not, and that he could not make a valid or legal mortgage. The defendant did not accept the tender; and the plaintiff afterwards, while still under age, repudiated the contract, on the ground of infancy, and so notified the defendant:—

Held, that what the defendant contracted for was a document which would give him security on the land, which the mortgage tendered did not; the plaintiff was unable to perform a condition precedent, and that was fatal to his claim for rescission based upon the provision of the contract referred to.

Held, also, that the plaintiff could not, on the strength of his infancy, recover the moneys paid by him; he became the "potential owner" of the land, listed it for sale, tried to sell it, and acted as the owner.

Short v. Field (1915), 32 O.L.R. 395, followed.

Specific performance of the contract was awarded in favour of the plaintiff on payment of all costs.

Judgment of SUTHERLAND, J., affirmed.

ACTION to recover \$390 which the plaintiff had paid to the defendant upon a contract for the purchase of land, and for rescission of the contract; or, in the alternative, for specific performance.

September 30. The action was tried by SUTHERLAND, J., without a jury, at Toronto.

J. J. Gray, for the plaintiff.

W. E. Raney, K.C., for the defendant.

October 18. SUTHERLAND, J.:—By an agreement dated the 25th March, 1912, the defendant, a real estate agent, bought from Stephen J. Thome, lot No. 17 on the north side of Robert street in the village of Weston, plan No. M. 338, for \$600. The said lot, together with other lands, was then, and also at the time of the agreement between the plaintiff and defendant hereinafter referred to, subject to a mortgage of \$10,000 to one Tyrrell.

On the 2nd June, 1913, the plaintiff signed a written option to purchase the said lot from the defendant for \$700, which offer was accepted. The plaintiff employed a solicitor to search the title; and, upon the evidence, I find that he was told by the solicitor that the defendant was himself purchasing the property

under an agreement, and that it would be necessary for the plaintiff to protect himself by seeing that the defendant kept up his payments.

Soon after the date of the agreement, the plaintiff paid the sum of \$250 on account of the purchase-money, and thereafter made certain other payments, amounting to about \$140, up to November, 1914. On the 12th November, 1914, he signed a written repudiation of the agreement, on the ground that he was under the age of twenty-one years at the time he entered into it.

It appears from the evidence that no advantage was taken of the plaintiff on the sale, either as to title or as to value. He was not altogether inexperienced in real estate transactions. He was aware that being under age he was under disability and could not legally and effectually execute certain documents in connection with real estate. For this reason, a previous real estate transaction which he entered into was carried out in the name of an uncle. He informed the solicitor who acted for him, and who was at the same time the defendant's solicitor, of the fact of his infancy; but the latter, for some reason, did not communicate the fact to the vendor.

The plaintiff admits that he went into the transaction as a speculation, and expected to dispose quickly of the property and make a profit. A short time before his repudiation of the contract, he went to Messrs. Goulding & Company, the agents for Thome, to inquire how the defendant was keeping up his payments on his contract. He then learned that the defendant was then owing more on his contract than the balance remaining unpaid by the plaintiff to the defendant on their contract. He says that he offered to pay up the balance of his contract and requested a deed from the defendant, but was put off. In the end, a writ was, on the 19th October, 1914, issued by the plaintiff, suing by Christopher Brookbanks, his uncle, as next friend, in which he seeks to recover from the plaintiff the sum of \$390 and interest, and asks that the agreement be set aside, and, in the alternative, claims specific performance of the agreement.

The evidence discloses that the plaintiff was born on the 20th February, 1894, and came of age therefore on the 20th February, 1915. The action was tried on the 30th September, 1915.

During the hearing, the plaintiff filed a written statement,

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signed by him, whereby he adopted the proceedings taken by Brookbanks on his behalf and as his next friend, relieved him from the further conduct of the suit, and assumed liability for the costs of the commencement and initiation and prosecution of the action.

Finding as I do that no fraud was perpetrated upon the plaintiff, and it being clear to my mind from the evidence that the plaintiff has simply rued his bargain, I am unable to see that he can recover the moneys paid by him on account of the contract. I think the case of *Short v. Field* (1915), 32 O.L.R. 395, following the case of *Wilson v. Kearse* (1800), Peake Add. Cas. 196, is binding on me and conclusive. I do not think the alleged delay of the defendant was such as to bring this case within the general law as indicated in Sugden's Vendors and Purchasers, 14th ed., p. 268; see also *Stickney v. Keeble*, [1915] A.C. 386.

On the 7th December, 1914, after the writ had been issued, the solicitor for the defendant wrote to the solicitors for the plaintiff a letter from which I quote as follows: "I notice in your writ of summons that your client claims rescission of the contract and return of the purchase-money; or, in the alternative, specific performance of the contract. I beg to state that my client is ready and willing at any time to grant specific performance of the contract, and will give a deed to your client on payment of the whole of the purchase-money and a mortgage back as soon as your client becomes of age; or, if he wishes to give a mortgage before that time, the mortgage be given by his guardian or next friend. Without in any way admitting that my client has been at fault so far, yet, if your client sees fit to settle the matter along the above lines, I will recommend to him to pay the costs so far incurred."

As the plaintiff in his statement of claim has asked for specific performance as an alternative relief, I will grant that relief if he now desires to avail himself of it, on the condition of his paying the defendant's costs of suit. If he is not prepared to accept this, the action will be dismissed with costs.

The plaintiff appealed from the judgment of SUTHERLAND, J.

November 17 and 18. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

J. J. Gray, for the appellant, argued that the Court should adjudge rescission and return of the money paid, by reason of the appellant's infancy. He had repudiated the agreement before coming of age, and had received no benefit from the contract: *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589, at p. 594; *Corpe v. Overton* (1833), 10 Bing. 252; *Rose v. Watson* (1864), 10 H.L.C. 672, at p. 678. The defendant never was in a position to give a conveyance, as he never had the title: *Re Hunt and Bell* (1915), 34 O.L.R. 256; *In re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666. The plaintiff could not be forced to carry out the contract, because there were building restrictions upon the land, of which he knew nothing: *Carlisch v. Salt*, [1906] 1 Ch. 335; *In re Cox & Neve's Contract*, [1891] 2 Ch. 109; *Harris v. Robinson* (1892), 21 S.C.R. 390, at p. 400, and p. 402; *Ames v. Conmee* (1905), 10 O.L.R. 159, at p. 171; *Everett v. Wilkins* (1874), 29 L.T.R. 846. The evidence shews that at one time the appellant offered to pay the defendant in full for a deed, but this offer was refused.

W. E. Raney, K.C., for the defendant, respondent, argued that the instrument tendered was not a mortgage, because the affidavit on it, made by the appellant, stating that he was twenty-one years of age, was false to the knowledge of the appellant. Neither did it give any security on the land. The appellant should not be allowed to rescind, nor should he get back the money which he had already paid in: *Short v. Field*, 32 O.L.R. 395. The respondent was willing, even now, to perform the contract.

Gray, in reply, said that the appellant had tendered the only mortgage he could make.

November 26. RIDDELL, J.:—An appeal from the judgment of Mr. Justice Sutherland of the 18th October, 1915.

The plaintiff, then and at the time of the teste of the writ herein an infant, on the 2nd June, 1913, entered into a contract with the defendant, who was not aware of such infancy, for the purchase of a certain lot in Weston.

He employed a solicitor to search the title, and was informed that the defendant did not own the lot, but that his rights were under an agreement; and therefore the plaintiff should protect himself by seeing to it that the defendant kept up his payments

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under his agreement. The plaintiff paid \$250 shortly after the making of the contract, and thereafter made other payments amounting to about \$140, all with knowledge of the state of the defendant's title. Finding that the defendant was in arrears in his payments, the plaintiff went to the defendant, and the following took place, according to the plaintiff's account:—

"I came up to Mr. Moffatt, I says to him, 'Here now, Mr. Moffatt, if you can give me a clear deed, I will pay you all the money that I owe you on the property.' And he says, 'Well now, Robinson, I have a sale, there is a lady in, and I have a sale on, and if I come in this sale I will get you your deed, and I will let you know,' he said. Time went on, and I never got any letter or any word of any kind, and I called at Mr. Moffatt's house, and he says to me, he says, 'Robinson,' he says, 'I can't get you that deed,' he says; 'this sale hasn't went through;' and he says, 'You will just have to wait.' And that is all that was said at the house to my recollection."

Then he went to his solicitor, Mr. Gray; and it was determined to take advantage of a clause in the contract of sale which reads: "Provided also that if no default has been made in the payments under this agreement and if the purchaser shall have paid to the vendor fifty per cent. of the purchase-price, he shall then be entitled to a deed of the said property on giving to the vendor a mortgage for the balance of the said purchase-price on the terms of this agreement." A mortgage was drawn up for \$275, the plaintiff made an affidavit that he was over 21 years of age, and procured a witness to swear to the same—he knew at the time that he could not make a valid or legal mortgage. Apparently a tender was made of the remainder of the fifty per cent. of the purchase-price and of the mortgage, but it was not accepted. No further tender was made, but the plaintiff, on the 12th November, 1914, signed and caused to be sent to the defendant a repudiation of his contract, declaring the same to be void, as he was under the age of twenty-one years—he was born, it appears, on the 20th February, 1894.

The writ of summons in this action was issued on the 19th November, 1914, claiming the return of moneys paid under "a purported agreement . . . void, the plaintiff being under the age of twenty-one years and having repudiated same, or, in the

alternative, for rescission . . . on the ground that the defendant is unable to make title . . . or, in the alternative, for specific performance . . . ”

The statement of claim alleges the contract, the defect in the defendant's title, a tender on the 10th November of the difference between fifty per cent. and the amount then already paid and of the mortgage, refusal by the defendant, and that the defendant held under onerous building restrictions—the claim is for return of the money paid, etc., and, in the alternative, for specific performance. The defence is in substance an offer of specific performance and objection to the mortgage offered.

There was some argument on the hearing of the appeal that there had been something in the way of a tender or offer to pay the defendant the full amount due, but this is not pleaded, nor, as I think, proved.

After the writ was served, the defendant offered specific performance and to pay the costs so far incurred; but this offer was refused—land had gone down, and the plaintiff desired to take advantage of his infancy.

Mr. Justice Sutherland dismissed the action.

To deal first with the want of title—it is well established that a purchaser may, on discovering the vendor's lack of title, repudiate the contract, but he must do this with reasonable promptness—“forthwith” is the word sometimes used—Dart on Vendor and Purchaser, 7th ed., vol. 2, p. 1067. Here the plaintiff knew of the defect, and thereafter himself tried to sell the land, made payments on it, tendered a mortgage made by himself upon it, and in all things acted as though the contract was valid—it is not open to him to repudiate on that ground alone.

As to the failure to convey, the vendor must be in a position to make a good conveyance at the date fixed for completion: *Murrell v. Goodyear* (1860), 1 D.F. & J. 432; and a conveyance by himself and not another: *In re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, and other cases in the same and the next volume—*In re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310: *In re Thompson and Holt* (1890), 44 Ch. D. 492.

If, therefore, the purchaser was entitled to a deed on tender of the balance of the fifty per cent. and the mortgage, he became entitled to rescission.

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We have had occasion recently to consider a case not wholly dissimilar: in *Pioneer Bank v. Canadian Bank of Commerce* (1915), 34 O.L.R. 531, we held that a certain document which might for some purposes be called a bill of lading was not a bill of lading for the purposes of a contract which plainly imported that what was intended was a document giving security on the goods to the promisors. In the present case it is plain that what was contracted for by the defendant was a document which would give him security on the land; and this the plaintiff's mortgage did not.

It is no answer to say that the plaintiff could not give a valid and registrable mortgage; he was unable to perform a condition precedent, and that is fatal. Had the defendant, indeed, been aware at the time of the contract that the plaintiff was under age all the time, it might be plausibly—perhaps successfully—argued that what was meant by “mortgage” was what the plaintiff could give—but that is not proved.

The whole question then is as to the effect of the plaintiff's infancy—nauseating as it is to see a plea of infancy set up by a real estate speculator who has had some experience, the plaintiff is entitled to the benefit of the law, however we may find it.

I think that we are bound by the case *Short v. Field*, 32 O.L.R. 395, in this Court (when otherwise constituted), to hold that the plaintiff cannot recover back the moneys already paid by him—he became the “potential owner of the place,” listed it for sale, tried to sell it, and acted much more as the owner than did the infant in *Wilson v. Kearsce*, Peake Add. Cas. 196.

The appeal should be dismissed with costs—with the same right to specific performance as is given by my learned brother Sutherland, on payment of all costs, including the costs of this appeal.

I may add that I think this young man just beginning life is extremely lucky if he escapes a prosecution for perjury; moreover, on his own shewing, he attempted to put off on the defendant as a mortgage what he knew not to be a legal mortgage, which looks like another crime.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD and KELLY, JJ., agreed in the result.

Appeal dismissed.

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STONEHOUSE v. WALTON.

Deed—Release of Interest in Land—Voluntary Deed—Action to Set aside—Lack of Independent Advice—Undue Influence—Laches and Acquiescence.

Under the will of a person who died in June, 1902, the plaintiff became entitled to a life interest, after the expiry of the life interests of her foster parents, in a farm. In July, 1902, the plaintiff, then a woman of mature years, at the solicitation of the defendant, to whom the farm had been devised after the plaintiff's death, and who was the son and one of the executors of the testatrix, signed and sealed a document whereby she covenanted and agreed with the defendant and the other executors of the will that upon her marrying or "leaving the property" she would give up possession of it. The plaintiff was paid nothing. She became engaged to be married in 1906, and was married in 1908, when she left the farm. Her foster mother died in 1913, and her foster father was still alive on the 3rd April, 1902, when this action was begun, to set aside the deed executed by her:—

Held, that the plaintiff had, by the evidence given at the trial, satisfied the onus which was upon her of shewing some substantial reason for setting aside her voluntary deed: in view of the fact that she had no independent advice and no opportunity to secure it, and was under the influence of her foster mother, exerted to induce her to execute it, the deed could not, if the plaintiff had come promptly to the Court for relief, have been allowed to stand; but her remedy had been barred by her long-continued acquiescence and laches.

Huguenin v. Baseley (1807), 14 Ves. 273, and *Allcard v. Skinner* (1887), 36 Ch.D. 145, followed.

AN action by Edith Stonehouse against William Ralph Walton to set aside a certain agreement dated the 4th July, 1902.

The action was tried by SUTHERLAND, J., without a jury, at Toronto.

W. Laidlaw, K.C., for the plaintiff.

J. E. Jones, for the defendant.

November 26. SUTHERLAND, J.:—The plaintiff, when quite young, was adopted by Thomas and Elizabeth Forfar. In the year 1902 she was 28 years of age, and from almost her infancy up to then had lived with her adopted parents, in the township of Scarborough, in the county of York, with the exception of certain short periods when she was at the homes of Mrs. Forfar's brother and her step-sister. She never received wages except for these periods, and on her return home gave the money she then earned to her foster parents, in whole or part.

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Elizabeth Jane Walton, the mother of the defendant, was the wife of one George A. Walton, a brother of Elizabeth Forfar. Thomas Forfar was at one time the owner of the north-west quarter of lot number 11 in the 2nd concession of the said township of Scarborough; but, having become financially involved in some way, he lost it, and it was purchased by Elizabeth Jane Walton or by her and her husband, the conveyance being taken in her name. Thereafter she permitted the Forfars to occupy the farm under a lease, at a nominal rental.

She was in the habit of coming from New York, where her husband and herself were living, to visit at the farm occasionally, and in this way met and became well acquainted with the plaintiff, though it is not suggested in the evidence that any special fondness towards her had been aroused on the part of Mrs. Walton.

According to the evidence of George A. Walton, a short time prior to their leaving New York for a visit to Europe, he and his wife, on the 23rd May, 1900, went to the office of his attorney, for the purpose, as he says, of obtaining printed forms of wills. Having obtained these, he drew his own will, and thereafter that of his wife from her dictation. He says he wrote the intention of his wife as he understood it at the time; Mrs. Walton's will contains this provision: "My Scarborough farm to be leased at \$5 per year to Thomas and Elizabeth Forfar now occupying the same during their lives respectively and after their death their adopted daughter Edith is to have the same privilege of renting at five dollars per year during her lifetime after which it is to go to my son William Ralph or his heirs."

The wills were left in the vault of the lawyer, copies being taken with them by Mr. and Mrs. Walton. Some time after their return to New York and several months before her death, Walton says that his wife, having looked at the will or copy, said to him: "I never intended Edith to have the farm if she got married and got a home; if she got married and got a home I wanted that for my son."

He says, furthermore, that she instructed him to have the alleged error rectified; but, being busy, he did not attend to it; and her death occurring suddenly on the 11th June, 1902, prevented this being done. He does not pretend that he had written instructions from her, and the matter rests solely on his own

evidence. It is clear, of course, therefore, that legally the plaintiff took under the will the benefit which it provided.

The executors named in the will are the defendant, William R. Walton, George Hogarth, and the said George A. Walton. The testatrix was buried in Toronto, and at or after the funeral George A. Walton says that he told his son, the defendant, and his sister, Mrs. Forfar, about the alleged error in the will. He says that he also told his son to have a paper ready, and wrote his sister to take Edith (the plaintiff) to Toronto. He adds that his sister had told him that Edith would do anything she would ask her to.

What happened subsequently is related in the somewhat conflicting evidence of the plaintiff and defendant.

The plaintiff says that she did not know of the will the testatrix had made, or that a provision in her favour was contained therein. It seems somewhat curious that George A. Walton, being an executor of the will, should speak to his sister and son about this alleged error when at the funeral and arrange with them to have it rectified, without taking the trouble to see the plaintiff in the matter, and particularly when the alleged error rested solely upon his own statement.

The plaintiff says that Mrs. Forfar asked her, some two or three days before the 4th day of July, 1902, if she would go to Toronto with her; and, on her inquiring what she would be wanted for, no answer was given to her. On that day she drove to Toronto with Mr. and Mrs. Forfar, and on arriving there accompanied the latter to the defendant's office. She says that he read "something off a paper," and told her her name was mentioned in the will, and read the will and told her she was getting something under it; that "I was to have the farm during my lifetime and whether I was married or not. He gave me to understand I must sign it. I do not think I made any objection; was quite willing to sign." She says that she did not understand what it was she was signing, and did not know but that it was something in connection with the will. She says that up to then she had not known that there was a will. She says further that he then had a conversation apart from her with Mrs. Forfar, during which the latter said to him that she knew Edith would do anything that was right, and that he said she could be forced to sign if she were not willing. He then left the room for a time and returned with

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a paper and asked her to sign it. She could not recall whether he read it to her or not.

It is to be remembered that he also was an executor of the will, as well as the person alone interested in securing the execution of the document by the plaintiff. She says that she cannot remember whether she signed the document or not, or recall if Mrs. Forfar, who appears to have been a witness, signed it. He paid her \$1 and gave her a copy of the agreement.

The paper referred to is the agreement in question, is dated the 4th July, 1902, and the parties to it are the plaintiff, called "the beneficiary," of the first part, the executors, so-called, of the second part, and the defendant, called "the legatee," of the third part, and is in substantial part as follows:—

"Whereas in and by the last will and testament of the said Elizabeth Jane Walton, deceased, her Scarborough farm was directed to be leased for the sum of five dollars per year to Thomas and Elizabeth Forfar during their lives respectively, and after their death to their adopted daughter Edith (the above-named beneficiary), she to have the same privilege of renting at five dollars per year during her lifetime, after which the property is to go to the above named legatee and his heirs:—

"And whereas it is acknowledged by the parties hereto that the intention of the testatrix, the said Elizabeth Jane Walton, was that the privilege aforesaid should pass and continue in the beneficiary so long only as she remained unmarried and in personal possession and enjoyment of the said farm property, and the beneficiary has agreed to deliver up full and peaceable possession and her right and title to the property and to the proceeds thereof during her life to the executors and the legatee and his heirs in accordance with the will, upon the happening of either of such events:—

"Now therefore this agreement witnesseth that, in consideration of the premises and of the sum of one dollar (the receipt whereof is hereby acknowledged) the above named beneficiary covenants and agrees with the parties hereto of the second and third parts that upon her marrying or upon her leaving the property so that she shall no longer have the direct personal use and enjoyment of it she shall at once deliver up to the executors full and peaceable possession of the said Scarborough farm referred

to in the will above in part recited, and that she will transfer and set over any and all the rents and profits derived and to be derived from the said farm after the day and date of her marriage as aforesaid or her leaving the premises in the way mentioned."

The original of the document, produced at the trial, is executed under seal by the plaintiff, defendant, Hogarth, and George A. Walton, and the signature of Elizabeth Forfar appears as a witness.

The plaintiff says that, when Mrs. Forfar would not tell her what she wanted her to go to Toronto with her for, it struck her as strange, but that she had no fears, as she was accustomed to do what Mrs. Forfar wished her to.

The plaintiff also says that on the way home she read the document, and either read or explained it to her mother, and thinks her father heard it too. She says that, having done so, she raised an objection to it. Her objection was that she was giving up her rights if she got married. She says that it was not her mother's desire, but that she understood it was the desire of the testatrix and the defendant. She says that, when her mother knew that she objected, she (the mother) was disturbed about the matter, and because she had signed the paper, and was sorry. She says that her mother said she would speak to her brother. She admits that from then until now she knew "that she had signed a life estate away after her marriage." She says, however, that, ever since she understood the effect of the agreement, she had made up her mind to bring an action; but admits that she had still remained friendly with the defendant, and, though she had seen him at different times, she had never spoken to him about it.

The writ in this action was issued on the 3rd day of April, 1914; and she says that thereafter she spoke to the defendant's wife, a year ago last spring; and, in consequence, the defendant came out to see her. After a talk, she says, she told him she would "leave it rest for a time," but did not say she would not do anything further. She admits that in 1911 she saw a lawyer about the matter. She says that she had been leaving the matter in the hands of her mother, Mrs. Forfar.

Letters probate of the will were duly issued on the 15th day of September, 1902, to George A. Walton alone, out of the Surrogate Court of the County of New York, in the State of New York.

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The plaintiff became engaged to be married in 1906, and was married in 1908, when she left the farm. Ancillary letters probate were issued out of the Surrogate Court of the County of York to the three executors named in the will, on the 9th day of March, 1911. Mrs. Forfar died apparently in 1913, having been ill for a long time before. The plaintiff says that after one severe illness of Mrs. Forfar she spoke to her, and she still said the same thing, that she would speak to her brother. She says that, with the approval of Mrs. Forfar, she consulted a lawyer in 1911, but she cannot recollect if she afterwards talked it over with her or not. Forfar is still living, but it was stated at the trial that he was old and ill, and not very well able to attend thereat.

The defendant's version of the matter is this. He says he had known from his father, then living in New York, that the plaintiff was likely to come to his office. She did come on the day in question, and there was a general talk. He says that the wish of his mother was spoken of, and that both the plaintiff and Mrs. Forfar appeared to know about it. The will was read over, and reference made to his father's correspondence about the testatrix's wish to rectify the error in the will. He says he has not now any of the correspondence. He denies that he ever said that the plaintiff could be forced to sign, and says that there was no hesitation on the part of the plaintiff or Mrs. Forfar in complying with his mother's wishes. He says that he thinks the agreement was read over in the office of Mr. Briggs, the lawyer who drew up the document, but cannot remember definitely as to this. He says he was never spoken to about the matter afterwards until in 1914, after he was served with the writ. He says that it did not occur to him that she should have any advice when her mother was with her, and that she seemed agreeable to do what the mother would wish.

In the much-cited case of *Huguenin v. Baseley* (1807), 14 Ves. 273, a "voluntary settlement by a widow upon a clergyman and his family" was "set aside; as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs; upon the principles of public policy and utility, applicable to the relation of guardian and ward, etc.;" and the Lord Chancellor (Eldon), at p. 300, said: "The question is, not, whether she knew what she was doing, had done,

or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf." And again: "I represent the question thus: whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences, which the defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and, though perhaps they were not aware of the duties, which this Court required from them in the situation, in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle it is necessary to impute knowledge, which the party may not actually have had."

In *Allcard v. Skinner* (1887), 36 Ch. D. 145, it was "*held*, that although A. had voluntarily and while she had independent advice entered the sisterhood with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of S. and N., and to the rules of the sisterhood, she would have been entitled on leaving the sisterhood to claim the restitution of such part of her property as was still in the hands of S., but not of such part as had been expended on the purposes of the sisterhood while she remained in it. But *held*, by the Court of Appeal (*dissentiente* Cotton, L.J.) (affirming the decision of Kekewich, J.), that under the circumstances the plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood." Lindley, L.J., says, at p. 186: "More than six years had elapsed between the time when the plaintiff left the sisterhood and the commencement of the present action. The action is not one of those to which the Statute of Limitations in terms applies; nor is that statute pleaded. But this action very closely resembles an action for money had and received where laches and acquiescence are relied upon as a defence; and the question is whether that defence ought to prevail. In my opinion it ought. Taking the statute as a guide, and proceeding on the principles laid down by Lord Camden in *Smith v. Clay* (1767), 3 Bro. C.C. 639 (n.), and by Lord Redesdale in *Hovenden v. Lord Annesley* (1806), 2 Sch. & Lef. 607, 630, the lapse of six years becomes a very material element for consideration." And at p. 187: "So long as the relation between the donor and the

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donee which invalidated the gift lasts, so long is it necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor. But this necessity ceases when the relation itself comes to an end; and if the donor desires to have his gift declared invalid and set aside, he ought, in my opinion, to seek relief within a reasonable time after the removal of the influence under which the gift was made. If he does not the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it." Bowen, L.J., says at p. 193: "In my view, this appeal ought to be dismissed, and dismissed on the ground that the time which has elapsed, though not a bar in itself, though not accurately to be described as mere laches which disentitles the plaintiff to relief, is nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world—namely, that the lady considered her position at the time, and elected and chose not to disturb the gift which she then at that moment felt, if she had the will, she had the power to disturb."

Reference to Underhill's Law of Trusts and Trustees, 7th ed., p. 95; Kerr on Fraud and Mistake, 4th ed., pp. 147, 148, and 149; *Cox v. Adams* (1904), 35 S.C.R. 393; reference also to *Bank of Montreal v. Stuart*, [1911] A.C. 120; *In re Howes, Ex p. White*, [1902] 2 K.B. 290; *Chaplin & Co. Limited v. Brammall*, [1908] 1 K.B. 233.

The rule as to the onus in actions of this kind is, "when the beneficiaries set up the deed as against the donor the onus is upon" them; and "when the settler asks to have the deed set aside the onus is upon him."

In short the onus is in general upon the person seeking relief, unless the beneficiary occupied a fiduciary position toward the settlor.

In this case the plaintiff, while called "the beneficiary" in the agreement, and rightly so-called, having regard to the provision made in her favour by the terms of the will, might with equal propriety have been termed "the legatee," and the defendant, though called therein "the legatee," might also have been called

“ the beneficiary.” But, as between themselves, it is the one who executed the release in favour of the other who is seeking relief. Applying, therefore, the test indicated, the onus is upon her to shew some substantial reason why this voluntary deed should be set aside. I think she has satisfied that onus, and that, in view of the fact that the plaintiff had no independent advice and no opportunity to secure it, and was undoubtedly under the influence of her foster mother, exerted to induce her to execute it, the release could not, but for the laches on the part of the plaintiff, which followed its execution, be allowed to stand.

When, however, the further fact is taken into account that the beneficiary under the document, the defendant, was at the time an executor under the will in question, with a duty cast upon him to deal with the beneficiaries, inclusive of the plaintiff, according to its terms, the onus in these circumstances being shifted from the plaintiff to him, is one, I think, he has not substantially met. Had the release therefore been attacked within a reasonable period of time, or at all events within a reasonable period after the plaintiff had by marriage been withdrawn from any influence of her foster mother, and obtained an opportunity to consult her husband, I would have felt obliged to set it aside. It is true that even the lapse of considerable periods of time have in some cases not been held sufficient to prevent relief being given.

In the present case, however, the release was executed in the year 1902, when the plaintiff was a woman of mature years. She learned almost immediately thereafter the nature of it and its effect upon the interest she had been given under the will. For six years subsequently, in the house with her foster mother and presumably still subject to some extent to her influence, and perhaps also placing some reliance upon her promise that she would speak to her brother about the matter, she did nothing. In the year 1908 she married and left the home, influence, and control of her foster mother, and went to live elsewhere with her husband. She thereafter had the opportunity of his independent counsel, but did nothing definitely to shew any intention on her part of bringing an action to set aside the release for the period of three years. In the year 1911 she apparently consulted a solicitor with reference to the matter. We do not know the advice then given, but at all events it was not of such a kind as to lead her to

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take prompt action, even at so late a date; and no definite action was taken by her until three years later, when the writ in the present action was issued on the 3rd day of April, 1914. By this late date the foster mother of the plaintiff had died, and the evidence of the only available witness, independently of the plaintiff and defendant, as to what actually occurred at the time of the execution of the release had been lost.

While it is true that the position of the defendant has not been substantially altered in the meantime, as Mr. Forfar is still alive, and is presumably in receipt of the rent from the farm, though not now residing thereon, nevertheless I am of opinion that any remedy the plaintiff might have had if she had applied promptly to the Court for relief has been barred by her long-continued acquiescence and laches.

I do not think, however, that it is a case for costs, and the plaintiff's action will, therefore, be dismissed without costs.

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Nov. 27.

[IN CHAMBERS.]

RE STRATFORD LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-law—Petition for Submission to Electors — Sufficiency of Number of Petitioners — Ascertainment—Duty of Council—Liquor License Act, R.S.O. 1914, ch. 215, sec. 137 (4) —Refusal to Submit By-law—Mandamus—Costs.

By sec. 137, sub-sec 4, of the Liquor License Act, R.S.O. 1914, ch. 215, it becomes the duty of the council of a municipality to submit a proposed local option by-law to the electors, if a petition in writing signed by at least 25 per cent. of the total number of persons qualified to vote is filed.

Re Halladay and City of Ottawa (1907), 15 O.L.R. 65, distinguished.

A petition was filed, presented to the council, and referred to the Clerk; his report that it was sufficiently signed was received; a by-law was drafted and brought before the council, and a motion was made at a meeting of the council that the by-law be read a first time; that was defeated by a majority vote:—

Held, upon the evidence, that the petition presented was sufficiently signed; and it was the duty of the council to submit the proposed by-law to the voters; the intention to refuse to discharge this duty abundantly appeared; and a mandamus should be issued directing the council and its members to submit the by-law.

The costs of the motion for the mandamus were ordered to be paid individually by the members of the council who voted against the motion.

MOTION by David M. Wright for a mandamus directing the Municipal Council of the City of Stratford and the members

thereof to give effect to a certain petition presented to the council, by submitting a local option by-law to the vote of the municipal electors.

Section 137(4) of the Liquor License Act, R.S.O. 1914, ch. 215, is as follows: "If a petition in writing signed by at least 25 per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections is filed with the Clerk of the municipality, on or before the 1st day of November next preceding the day upon which such poll would be held, praying for the submission of such proposed by-law, it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

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November 26. The motion was heard by MIDDLETON, J., in Chambers.

R. T. Harding, for the applicant.

J. C. Makins, K.C., for the respondents.

November 27. MIDDLETON, J.:—A petition signed by a very large number of ratepayers was duly filed with the Clerk of the City of Stratford on the 15th September, 1915, and presented to the city council at its meeting on the 20th September. Upon examination by the City Clerk and Assessor, it was found to contain 1,211 names. The voters' list contained 4,025 names; the petition therefore contained about 200 more than the requisite number of signatures.

The report of the City Clerk and Assessor was before the council at its meeting on the 18th October, when the report was referred to a committee of the council, who were directed to report at the next meeting. At that next meeting, on the 1st November, a resolution was passed directing the preparation of a by-law, and the Clerk was instructed to scrutinise the petition again, and certify whether it had been signed by 25 per cent. of the ratepayers whose names appeared on the last revised list; and a special meeting to consider the petition was appointed.

On the 11th November, the Clerk reported that the petition did contain the names of more than 25 per cent. of the persons named in the list of voters. He also reported certain correspondence and another petition which had been presented to him.

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A resolution was then passed directing the City Solicitor to prepare the necessary by-law for submission. It also appears that the committee to whom the matter had been referred prepared a report, but apparently it was not submitted to the council. This report stated that the petition was sufficiently signed.

At the meeting of the 15th November, the by-law having been received from the solicitor, it was moved that it be now read a first time. A motion was made in amendment "that the petition be scrutinised by the entire council, and that the Moral Reform Association be asked to supply the necessary proof of signature." This was ruled out of order; and the motion being submitted it was negatived.

There is only one other meeting of the council—that to be held on the 6th December—before the 10th December, the last day for advertising if the by-law is to be submitted at the January election.

The majority of the council having this refused to pass the by-law, this motion is made for a mandamus.

It is argued that the motion is premature, and that the council has until the last possible moment to determine whether it will pass the by-law or not; and it would follow logically that the Court could never grant a mandamus, because, after that critical moment had passed, it would obviously be too late—for the Court cannot dispense with the advertising stipulated by the Act.

To test the good faith of the council, I asked if an undertaking would be given to pass the by-law; but counsel had only the stereotyped answer, "I have no instructions;" so that I think it must be taken as reasonably established that it is the intention of the majority of the council to defeat the wishes of the petitioners and to avoid discharging the duty imposed upon the council by the statute, if that end can be accomplished.

It was also argued that it was premature to consider the matter, because the council had not yet determined to its satisfaction whether the petition was in truth adequately signed. On this motion there is no material whatever suggesting that the opinion expressed not only by the applicant but by the committee of the council and its Clerk and Assessor, after a long and careful scrutiny and after hearing those interested both pro and con, that the

petition is sufficiently signed, is erroneous; and I find that the petition presented was sufficiently signed.

The respondent relies upon the decision of my Lord the Chief Justice, speaking for a Divisional Court, in *Re Halladay and City of Ottawa* (1907), 15 O.L.R. 65, as establishing the proposition that the council, as a council, must enter upon a scrutiny and be satisfied that the petition is duly signed. In that case the statute was that relating to early closing by-laws, and the language was "if the council is satisfied that the application is signed by not less than three-fourths in number, the by-law shall be passed." No such provision appears in the statute here in question. It (the Liquor License Act, R.S.O. 1914, ch. 215, sec. 137, sub-sec. 4) provides that "if a petition in writing signed by at least 25 per cent. of the total number of persons . . . is filed . . . it shall be the duty of the council to submit the same to a vote of the municipal electors."

Here, there being the petition, it becomes the duty of the council to submit the proposed by-law to the voters; and the intention to refuse to discharge this duty abundantly appears. The pretext of any necessity or honest desire for further scrutiny cannot be given any weight or effect; and I think that the mandamus sought should be granted, with costs to be paid individually by those members of the council who voted against the by-law and who are parties to this motion.

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RE FENWICK.

Executors and Administrators—Intestate Domiciled in Foreign Country—Property in Ontario—Ancillary Letters of Administration—Title to Company-shares—Issue as to Ownership—Forum—Jurisdiction—Sale of Shares pendente Lite.

F., domiciled and resident in the State of Michigan, died there, *intestate*. Letters of administration to his estate were granted to a Michigan trust company by a Michigan Court; and subsequently, for the purpose of enabling shares of the capital stock of a commercial company incorporated in Canada, standing in the name of F., to be effectively dealt with, letters of administration, limited to the property of the deceased within the Province of Ontario, wherein the head office and works of the Canadian company were situated, were issued to an Ontario trust company; and a claim to the beneficial ownership of the shares, as against the deceased and his estate, was made by E.:—

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Held, that, as the shares had a local *situs* in Ontario, and the legal title was in the Ontario administrators, even though the Ontario letters of administration should be regarded as ancillary, the question of the true ownership should be determined by an Ontario Court.

Semble, that, had an action been brought by E. against F. in his lifetime, the Courts of Michigan could have determined the title to assets having a *situs* beyond that State, because they had jurisdiction over his person; or had F. died testate, so that the property vested in his executors, if they were subject to the jurisdiction of the Michigan Court, an action might well be maintained there.

In re Trufort (1887), 36 Ch. D. 600, *Enohin v. Wylie* (1862), 10 H.L.C. 1,13, and *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444, referred to.

Held, also, that a sale of the shares should not be directed while the title was in doubt.

APPLICATION by the National Trust Company, administrators in Ontario of the estate of George G. Fenwick, deceased, upon an originating notice, for an order directing the trial of an issue in the Supreme Court of Ontario to determine the title to certain shares of the capital stock of the Ford Motor Company of Canada and to the proceeds of other shares of the same stock in the hands of the said administrators. The head office and works of that company were situated in Ontario.

November 24. The application was heard by MIDDLETON, J., in the Weekly Court at Toronto.

W. E. Raney, K.C., for the administrators.

E. C. Cattnach, for Rachel Eby, claimant.

H. E. Rose, K.C., and *J. L. Ross*, for the next of kin of the deceased, beneficially interested in his estate.

November 27. MIDDLETON, J.:—The late George G. Fenwick was domiciled and resident in the State of Michigan. At the time of his death, he was the holder of 64 shares of stock in the Canadian Ford Company. Letters of administration were issued to the Detroit Trust Company by the Probate Court of the County of Wayne; and subsequently, for the purpose of enabling the stock in the Ford Motor Company of Canada to be effectively dealt with, letters of administration, limited to the property of the deceased within the Province of Ontario, were issued to the National Trust Company. Claim is now made by Mrs. Rachel Eby to the ownership of 32 of the 64 shares of stock, and she also claims to be entitled to receive part of the proceeds of the 32 shares already sold. This claim, no doubt made in good faith,

is resisted by those beneficially interested in the estate of the deceased.

Proceedings have taken place before a tribunal which, it is admitted, has no authority to pronounce a binding decision—a tribunal known as the Commissioners on Claims. These Commissioners have upheld the claim; and further proceedings have now been taken in the Circuit Court for the County of Wayne in Chancery, by Mrs. Eby against the Detroit Trust Company, by way of an action in which she seeks to establish her title with respect to the stock in question; and it is said that that action will shortly be tried in that Court.

Counsel for Mrs. Eby asks that no order shall be made directing a trial of any issue in this Court, but that the parties shall be left to await the adjudication of Mrs. Eby's rights in the Courts of Wayne County, where the intestate was domiciled.

The cases relied upon are all collected in *In re Trufort* (1887), 36 Ch. D. 600; but neither that case nor any of the cases there cited deal with the problem here presented; for in all of them the claim which was relegated to the adjudication of the Courts of the domicile was a claim arising with respect to the estate of the deceased, made by some one claiming title under him. The claim here is a claim against the deceased and against his estate.

Lord Westbury's statement in *Enohin v. Wylie* (1862), 10 H.L.C. 1, 13, places the matter more favourably to the contention made by Mrs. Eby than any other authority, but it falls very far short of being a statement that the proper forum for the adjudication of all claims made against the estate of a deceased person is the Court of his domicile. What is there said is: "I hold it to be now put beyond all possibility of question that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the Judge of the domicile. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the Judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the

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will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort."

The shares of this Canadian company have a local *situs* in Canada, and *primâ facie* the title to the shares ought to be determined by a Canadian Court. The only foundation for jurisdiction in the Court of Michigan would be that indicated in *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444, and repeatedly affirmed in other cases; the jurisdiction of the Court over the person of the defendant. Had an action been brought by Mrs. Eby against Mr. Fenwick during his lifetime, the Courts of Michigan could have determined the title to assets having a *situs* beyond that State, because they had jurisdiction over his person, and could for that reason compel obedience to their decrees. But upon Mr. Fenwick's death the situation became entirely changed: the title to these shares became vested not in the Detroit administrators but in the Ontario administrators; and the Courts of Michigan, although they had complete jurisdiction over the Detroit administrator, cannot by reason of that jurisdiction deal with the title to the shares vested in the Ontario administrators, which is in no wise subject to their jurisdiction.

Had Mr. Fenwick died testate, so that the property vested in his executors, if the executors were subject to the jurisdiction of the Michigan Court, the action might well be maintained there; but the case is entirely different where, as here, the title is in the Ontario administrators, even though the Ontario letters of administration be regarded as ancillary.

For these reasons, I think that I should direct an issue to be tried for the purpose of determining the title to these shares and Mrs. Eby's right to any portion of the proceeds of the other shares. In this issue, as the onus will be upon Mrs. Eby, she should be plaintiff; and the trial, unless application is made to the contrary, should take place at Sandwich.

Costs and further directions will be reserved to be dealt with by the Judge presiding at the trial of the issue.

The notice of motion asked for a direction for the sale of stock, there being a difference of opinion between those interested in the estate and Mrs. Eby as to the desirability of selling at the present time. I do not think that a sale should be directed while the title is in doubt.

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Nov. 29.

Mortgage—Short Forms Act—Additional Covenants—Default in Payment of Interest and Taxes—Acceleration Clause—Relief against—Payment of Interest in Advance—Bonus—Penalty—Construction of Mortgage-deed—Power of Court to Relieve against Penal Provisions—Costs.

Where a mortgage was made pursuant to the Short Forms of Mortgages Act, but contained additional covenants and provisions, it was *held*, that a provision for acceleration of the time for payment of the principal upon default as to *any* of the covenants or provisoes was an addition to or qualification of the statutory covenant for acceleration upon default of payment of *interest* and for relief upon payment of arrears of interest, and the same addition or qualification should be read into the power to relieve, so that where default was made in respect of the covenant for payment of taxes, the mortgagors should, upon payment of taxes, be relieved from immediate payment of the principal.

And so as to a provision requiring the payment as an indemnity of three months' interest in advance, in addition to the payment of the arrears of interest: the mortgagors, being relieved from the consequences of default, upon payment of interest up to date, should not be required to pay a sum, in the nature of a penalty, for interest in addition to the future interest.

The Court has power to relieve against oppressive and unfair forfeiture.

Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319, and *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710, referred to. The mortgagee was ordered to pay the costs of litigation occasioned by her unfounded claims.

Legislation in regard to mortgages similar to that protecting the holders of fire insurance policies, in respect of additions to the statutory conditions, suggested.

MOTION by the defendant to dissolve an interim injunction obtained by the plaintiffs, mortgagors, which restrained the defendant, mortgagee, from proceeding to exercise the power of sale contained in the mortgage.

November 22. The motion came on for hearing before MIDDLETON, J., in the Weekly Court at Toronto, and was turned into a motion for judgment, and so argued.

L. Davis, for the defendant.

W. J. McLarty, for the plaintiffs.

November 29. MIDDLETON, J.:—By mortgage dated the 20th February, 1915, the plaintiffs mortgaged to the defendant certain lands to secure \$4,000, with interest at 7 per cent., repayable \$300 in six equal consecutive half-yearly instalments of \$50, and the balance on the 20th February, 1920; the interest and instal-

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ments of principal being payable on the 20th February and 20th August in each year.

The mortgage is in pursuance of the Short Forms of Mortgages Act, but contains many added covenants and provisions. *Inter alia*, there is a provision that if the mortgagors "make default as to any of the covenants or provisoes herein contained the principal hereby secured shall at the option of the mortgagee . . . forthwith become due and payable." There is also a covenant that if the principal is not paid at maturity the mortgagors shall not be at liberty to pay the same except after three months' notice in writing or upon payment of three months' interest in lieu of notice; and a further covenant that if an action is brought or the lands are sold, the mortgagee shall be entitled "to be paid as an indemnity three months' interest in advance on the principal so paid or recovered in addition to interest to the date of payment." There is the ordinary covenant for payment of taxes.

The taxes for the year 1915 became in default, and the interest was also in default. The mortgagors tendered the amount of the interest, and are ready to pay the taxes and the costs incurred in serving notice of intention to exercise the power of sale; but the mortgagee refuses to stay her hand, claiming: (1) that, default having been made in payment of taxes, the Court has no power to relieve from the stipulated consequences of default; and (2) that the mortgagee is entitled, as a condition of any relief granted, to three months' interest on the principal money as a bonus, in addition to the interest earned and to be earned.

The mortgage being subsequent to the 4th August, 1914, the provisions of the Mortgagors and Purchasers Relief Act, 1915, cannot be invoked to aid the mortgagors.

In *Todd v. Linklater* (1901), 1 O.L.R. 103, it was held that where under clause 16 of the Short Forms of Mortgages Act the mortgagor is entitled to relief, all the consequences of default are at an end, and the mortgagee has no right to exercise the power of sale.

What is here contended by the mortgagee is, that this covenant provides solely for acceleration upon default of payment of interest and for relief upon payment of arrears of interest, and that, where the acceleration takes place not by default of pay-

ment of interest, but by default of the performance of the covenant to pay taxes, there is no provision for relief. As I would read the mortgage, this addition to the statutory covenant is in effect a qualification of or addition to the covenant, and I think I am warranted in reading into the power to relieve, the same qualification and addition; and, as the mortgagee has added to the one clause the acceleration upon default in payment of taxes, I should read into the other clause, giving the Court power to relieve, the corresponding addition to the power.

I am by no means satisfied that the power of the Court to relieve against oppressive and unfair forfeiture is as narrow as contended for by Mr. Davis. *Kilmer v. British Columbia Orchard Lands Limited*, [1913] A.C. 319, appears to recognise the existence of a much wider power to relieve against penal provisions than has sometimes been supposed; and my brother Britton found a way of affording relief in *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710.

I am also against the contention of the mortgagee that she is entitled to a bonus of three months' interest. Interest is money paid for the use of money. On the mortgagors being relieved from the default, the interest up to date will be paid, and the interest for the future must also be paid. I cannot see why there should also be paid another sum equivalent to the interest which will be normally earned and paid. If, on default of payment for one day, three months' interest must be given, although the loan continues and interest is thereafter earned, this so-called interest is clearly in the nature of a penalty. It is quite a different thing to demand a bonus of interest where the mortgage is paid off and the money must be idle for some time in the mortgagee's hands while seeking reinvestment. There, it may be a reasonable sum allowed for compensation for the premature or unexpected payment and the incidental trouble imposed upon the mortgagee.

In the result, this litigation appears to have been occasioned by the unfounded claims of the mortgagee, and she must bear the costs.

I much regret to find that in these times, when the Legislature has intervened to aid those unfortunately incumbered with a burden of debt, by means of the salutary provisions of the Moratorium Act,* this mortgagee—whose security does not come

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*The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.)

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under the provisions of that Act—should seek to enforce these harsh, I might say unconscionable, provisions of the mortgage security against the debtor; and I am not sorry to find my way clear to afford relief.

It is not inopportune that I should draw the attention of those in authority to the nature of the provisions sometimes found in mortgage securities. At one time, fire insurance policies contained so many provisions which were deemed unjust and oppressive that the Legislature intervened, providing a statutory form; and now no departure from that statutory form is of any validity unless the variation from the statutory provision is printed in conspicuous type and in red ink, nor unless it is held by the Court to be just and reasonable. Mortgagors now append their signatures at the end of a voluminous and compactly printed document, which they do not read, and which they could not understand or apprehend if they did read; and against many of the provisions embodied in this mass of printed matter the Court has no power to relieve. Without being unduly paternal, the Legislature might well afford to mortgagors a protection analogous to that afforded to policy-holders.

[There was an appeal by the defendant from the judgment of MIDDLETON, J., in favour of the plaintiffs as above; but, after the appeal had been in part heard by a Divisional Court of the Appellate Division, on the 17th December, 1915, a settlement was effected between the parties, and the judgment was varied by the Court, by consent, according to the terms of the settlement.]

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[BOYD, C.]

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LATIMER V. HILL.

Parent and Child—Liability of Parent for Maintenance of Forisfamiliated Infant—Contract—Implication—Quantum Meruit.

The plaintiff cared for and maintained the defendant's infant son for a period of more than 12 years, the child when two years old going to live with the plaintiff and remaining until he was taken away by the defendant, at the age of 15:—

Held, upon the evidence, that some compensation was contemplated between the parties; there was an implied contract, enforceable at law, to pay a *quantum meruit*.

In fixing a sum to be paid by the defendant for the care and maintenance of his child, regard was had to the boy's services to the plaintiff upon his farm for 3 years before the withdrawal; the defendant having said at the beginning that if the boy remained for any length of time it would not be right to take him away when he became of use.

Review of the authorities.

ACTION for the recovery of \$1,322.50 as the money value of the care and maintenance of the defendant's infant son, Milo James Hill, for twelve years; or for damages for depriving the plaintiff of the services of the boy at an age when he had begun to be useful.

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The action was tried by BOYD, C., without a jury, at Chatham.
R. L. Brackin, for the plaintiff.
J. H. Rodd, for the defendant.

November 29. BOYD, C.:—In October, 1902, the defendant, his wife having just died, brought an infant son, about two years of age, to be taken care of by the plaintiff. The plaintiff's wife was aunt of the boy's mother. The plaintiff was willing to keep the child for a year or so without pay until the defendant had time to settle his affairs; but, apart from that, the understanding expressed between them was, that the custodian should have the benefit of the work and services of the boy according as advancing age enabled him to render such services. The father said he would not give any writings; but, if the child was with the plaintiff for any length of time, it would not be right to take the boy away when he became of use on the farm. This controlled the whole situation, and indicated that some compensation was contemplated as between the parties.

About two years after the mother's death, the father asked the plaintiff what he was going to tax him, and the plaintiff said, "nothing." The father, however, did not re-marry till 6 or 7 years after, and then the plaintiff expected that the child would be taken back to the father and some compensation made for the intervening period, *minus* two years. But matters were left as they were, and the boy stayed on with the plaintiff till about the beginning of 1915, when the father induced him to leave. It was proved that the father had offered the lad \$2,000 if he would come back and stay and work for him.

From all the evidence and the conduct of the parties, I can fairly draw the conclusion that the care and maintenance of the boy for all these years was not intended to be and was not understood to be on a gratuitous basis out of consideration for the bereaved father or from philanthropic motives. The arrangement was broken by the interference of the father when the boy

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was about 13 years of age. For 3 years prior to his leaving I thought that the work done by the boy about balanced the outlay upon him; and, deducting the first two years, for which nothing was asked, I allowed \$500 as a reasonable sum for the care, maintenance, and education of the boy for 7 years. The intervention of the father disturbed and ended the engagement; and, in the circumstances, there is an implied contract to pay a *quantum meruit*.

Mr. Rodd, for the defendant, relies upon *Farrell v. Wilton*, 3 Terr. L.R. 232, a decision of Mr. Justice Wetmore in 1893, of which the head-note is, "that a father, who has given his child to another to adopt and rear, has, notwithstanding, the right to re-take the custody of the child at any time;" and, "further, that a father so re-taking his child is liable for maintenance during such period of adoption only by virtue of a contract express or implied." I do not quarrel with these legal propositions. And, in view of the learned Judge's holding on the facts that the child was taken over without any intention of charging anything to the father, i. e., upon a gratuitous basis, the dismissal of the action may have been right. Many of the statements in the reasons of the Judge do not appear to harmonise with some Ontario cases not cited.

Thus Hodgins, Master, in *Hughes v. Rees* (1854), 10 P.R. 301, decided that a father, whose children were maintained by another, and who could have obtained possession by *habeas corpus*, yet allows them to be so maintained, is liable for their support. This was based upon the decision of Blake, V.-C., in *Griffith v. Paterson* (1873), 20 Gr. 615, 618. No doubt, in both these cases the children had left because of the unpaternal conduct of the father—but should that make a substantial difference? There has been a development of the law in this regard: compare, for instance, the case of *Urmston v. Newcomen* (1836), 4 A. & E. 899, where it is queried by the Court whether a father deserting an infant child can be liable to a party who supplies the child with necessaries, no further proof of contract being given?

It may be that the American rule is in advance of our lines of decision, though it commends itself as a justifiable development. In 29 Cyc. 1611 it is in the text "that where a person supports a child at the parent's request a promise to pay therefor will be

implied, unless there was an understanding that the child shall be taken care of without charge."

I would call attention to *Wright v. McCabe* (1899), 30 O.R. 390, where there was a written agreement by which the father consigned his children to their grandmother to rear and educate on the condition that no demand was to be made upon him for their support. It was sought to shew by parol evidence that he had agreed to pay, and to have the instrument rectified. The action failed; and in the head-note it is said to be held that the father "could transfer his rights as a parent." That appears to be beyond what was decided. But there is a dictum in the case that seems in accord with the more advanced view. Counsel argues that there must be a contract to enable one who supports another's children to recover; and Meredith, C.J., says, "The Court would imply a contract."

I find it stated in Halsbury's Laws of England, tit. "Infants and Children," vol. 17, p. 116: "The authority" [contract] "may be implied, as, for instance, where he knowingly acquiesces in the child being maintained by a stranger." Eversley on Domestic Relations treats the point as not yet fully decided: 3rd ed., p. 539.

The law appears to be far from being in a settled condition; but in the present case my best judgment, after consideration, is to affirm the opinion expressed at the trial and to direct judgment to be entered for the plaintiff in the sum of \$500 and costs on the lower scale without set-off.

[MEREDITH, C.J.C.P.]

SHEWFELT v. TOWNSHIP OF KINCARDINE.

Bond—Cancellation—Liability of Sureties—Right of Action.

An action to have a valid instrument, not negotiable, delivered up to be cancelled, does not lie unless there is some real danger of its being used for an improper purpose, to the loss, in some way, of the party seeking its cancellation; and in a case in which there is a possibility that the instrument has not fulfilled all its purposes, there can, even where that danger may exist, be no such right of action.

Brooking v. Maudslay Son & Field (1888), 38 Ch. D. 636, and *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536, referred to for the practice of Courts of equity in decreeing cancellation of valid instruments and making declaratory judgments.

An action brought by the former treasurer of a municipality and his sureties, upon a bond given by them to secure the due performance of the

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duties of the office, to compel the cancellation of the bond, after the treasurership had come to an end, the treasurer's accounts had been audited and the audit adopted by the municipality, and after payment over by the old to the new treasurer, duly made accordingly, was dismissed with costs.

ACTION for cancellation of a fidelity-bond executed by the plaintiffs in favour of the defendants, the Corporation of the Township of Kincardine.

November 9. The action was tried by MEREDITH, C.J.C.P., without a jury, at Walkerton.

D. Robertson, K.C., for the plaintiffs, cited *Ascherson v. Tredegar Dry Dock and Wharf Co. Limited*, [1909] 2 Ch. 401; *Thompson v. Wilkes* (1856), 5 Gr. 594; *County of Frontenac v. Breden* (1870), 17 Gr. 645; Halsbury's Laws of England, vol. 3, pp. 92, 97; *Cooper v. Joel* (1859), 1 D.F. & J. 240; *Duncan v. Worrall* (1822), 10 Price 31; *Byam v. Byam* (1854), 19 Beav. 59; the Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (b).

W. Proudfoot, K.C., and P. A. Malcolmson, for the defendants, referred to *County of Simcoe v. Burton* (1898), 25 A.R. 478, and *County of Frontenac v. Breden*, *supra*.

November 29. MEREDITH, C.J.C.P.:—Although the matters involved in this litigation are things of frequent occurrence, and the one legal question upon which the rights of the parties depends is a simple one, it is said, on both sides, that no precedent has been found for this action.

The plaintiffs are, a former treasurer of the defendant municipality, and his sureties for the due performance of the duties of that office under the bond in question in the action.

Upwards of two years ago that treasurership came to an end, and the treasurer's accounts were duly audited, and that audit was adopted by the council of the municipality, and payment over, by the old to the new treasurer, was duly made accordingly.

The sureties subsequently sought to have the bond cancelled, but the defendants refused to cancel it; and now this action is brought to compel a cancellation of it.

The plaintiffs, not without some reason, object to remain—after the final audit and payment in accordance with it—as if under the obligation which the bond created.

But the defendants, not without some reason also, say that it is impossible to be quite sure that the audit covered all things, that sometimes debts and other liabilities remain concealed for years, even without misconduct, and so they cannot properly release the plaintiffs, or give up the bond, as long as it would be legally enforceable, should it be found there is yet something for which the treasurer should have accounted, but has not; and they point to the case of *County of Frontenac v. Breden*, 17 Gr. 645, as shewing an instance of that kind and the need for retaining the bond as long as it has any validity.

Ordinarily it would be said that there is no need for a release from an instrument the obligations of which have been satisfied, and which is not negotiable; that it is dead, in whomsoever's hands it may be.

But it may be made the basis of an unsuccessful, if not a successful, action upon it, which would not have been brought if there were a release in writing of its obligations or if it had been cancelled; and it might be urged as a ground of disqualification for office in the municipal council, as well as being otherwise hampering.

There is, therefore, something to be said on each side of the question, even in a case such as this, in which no one has much, if any, doubt that the bond could be cancelled without any loss to the municipality.

Upon principle I cannot understand why an action should lie to have a valid instrument, not negotiable, delivered up to be cancelled, unless there is some real danger of its being used for an improper purpose, to the loss, in some way, of the party seeking its cancellation.

The familiar practice of Courts of equity, in decreeing cancellation of valid instruments, was exercised only in cases where there was actual danger of their improper use to the injury of the party seeking cancellation. The subject is dealt with fully in the case of *Brooking v. Maudslay Son & Field* (1888), 38 Ch. D. 636; and the subject of declaratory judgments in *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536.

But, however that may be in a case in which the instrument has fulfilled all its purposes, it is quite a different thing in a case such as this, in which there is a possibility that it has not. In such a case I know of no law which gives such a right of action.

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To give effect to the plaintiffs' contention would be to put a legal obligation upon the obligee of the bond to make up all his claims when demanded and to be forever bound by them, so made, though it might have been impossible to have made them up with certainty. Such a limit may of course be put upon an obligee in the bond or by other binding agreement, but otherwise I know of no limits except those which statutes of limitations provide. The fact that some of the plaintiffs are sureties only does not, as it seems to me, lessen the defendants' rights, in this action, in this respect.

The action must be dismissed; and the general rule, costs to the successful party, should prevail.

[MASTEN, J.]

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McINDOO v. MUSSON BOOK CO.

Copyright—"Literary Composition"—Title or Name of Book—Infringement by Use of Similar Name—Copyright Act, R.S.C. 1906, ch. 70, sec. 4—
—"Passing off"—Reputation—Evidence.

There cannot in general be any copyright in the title or name of a book. *Dictum* of James, L.J., in *Dick v. Yates* (1881), 18 Ch. D. 76, approved.

Under the Canadian Copyright Act, R.S.C. 1906, ch. 70, sec. 4, unless the title itself amounts to a literary, scientific, or artistic work or composition, it cannot form the subject of copyright.

In this case, the name of the plaintiff's book, being simply descriptive of the book, was not the subject of copyright.

The defendant company had published and was selling a book with a similar name; but it was *held*, that the public reputation of the plaintiff's book had not been so established as to give him a right to complain of the "passing off" of the defendant company's book as his, even if there were adequate evidence of the "passing off."

Rose v. Melcan Publishing Co. (1896-7), 27 O.R. 325, 24 A.R. 240, distinguished.

MOTION by the plaintiff for judgment on the pleadings and affidavits filed in an action to restrain the defendant company from infringing the plaintiff's copyright in a book.

November 10. The motion was heard by MASTEN, J., in the Weekly Court at Toronto.

E. C. Ironside, for the plaintiff.

George Wilkie, for the defendant company.

November 30. MASTEN, J.:—Motion for judgment on the pleadings and affidavits filed. The parties by their counsel consent to the final disposition of the action on the material filed, and that affidavits be received in evidence in lieu of oral testimony, so that, read together, they shall constitute admissions of the resulting conclusions of fact, and that the motion shall be considered as a renewal of the injunction motion which was before the Court in June last. All material filed on the former motion, as well as on this motion, to be evidence on the motion, and the parties to have the right of appeal as after an ordinary trial. On this basis I direct that the motion may be entertained—and order accordingly.

The plaintiff is the publisher of a book entitled "The New Canadian Bird Book," in which he holds the copyright. The defendant is the publisher of another book on the same subject entitled "The Canadian Bird Book." The plaintiff's book was first placed on the Canadian market at or about the date of the copyright, and the defendant's book was issued and sold to the public in Canada in or about the spring of 1915, some three or four months later than the plaintiff's book.

The plaintiff's claim is based, first, on copyright. The certificate of copyright is produced. It is marked exhibit H. to McIndoo's affidavit. It appears to be in the usual form. The right which the registration confers is that set out in sec. 4 of the Act respecting Copyright, R.S.C. 1906, ch. 70.* The subject-matter to which that right relates and in which it inheres is a *literary composition*. In this case there is no complaint that the literary composition forming the body of this work has been infringed. The two works are absolutely different. The complaint relates solely to the title.

In the case of *Dick v. Yates* (1881), 18 Ch. D. 76, Lord Justice

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*4. Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an international copyright treaty with the United Kingdom, who is the author of any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print, cut, or engraving, and the legal representatives of such person or citizen, shall for the term of twenty-eight years, from the time of recording the copyright thereof in the manner hereinafter directed, have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and vending such literary, scientific or artistic work or composition, in whole or in part, and of allowing translations of such work from one language into other languages to be printed or reprinted and sold.

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James said (p. 93): "I desire to add that in my opinion, and I understand the Master of the Rolls to have expressed the same opinion, there cannot in general be any copyright in the title or name of a book."

This dictum appears to have been accepted from that time, and it is certain that under our statute, unless the title itself amounted to a literary, scientific, or artistic work or composition, it cannot form the subject of copyright.

No one can suggest that the words "The New Canadian Bird Book" amount to such a work or composition. The words are purely and simply descriptive of the book, nothing more or less.

The plaintiff also puts his case on another ground, namely, that the defendant is selling its book under the name or title of the plaintiff's work.

This is a phase of the ordinary doctrine of "passing off" usually treated in connection with the law of trade marks.

In order to succeed in such an action the plaintiff must shew that his book has become known to the public and sought for under the title adopted by him; to put it in another way, that it has acquired a public reputation under its title.

Secondly, the plaintiff, having thus acquired by user a prior right to the title, and having established a reputation by such user, must prove that the defendant is so acting as to pass its book off as that of the plaintiff, by using a similar title. The cases on this branch of the law are well collected in Scrutton's Law of Copyright, 4th ed., pp. 56 to 59 inclusive, and I find nothing in the Canadian decisions at variance with what is there laid down. Each case must be determined upon its own facts; but I am of opinion that upon the facts of this case the plaintiff must fail.

When the defendant's book appeared, the plaintiff's book had been on the market so short a time (about three months at the most) that its public reputation had not been established; and it is also very questionable whether, on the evidence afforded on this motion, there was adequate evidence of "passing off." This differs the case from *Rose v. McLean Publishing Co.* (1896-7), 27 O.R. 325, 24 A.R. 240, which was specially relied on by the plaintiff.

Judgment will go dismissing the plaintiff's claim.

Action dismissed with costs.

[APPELLATE DIVISION.]

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Nov. 30.

RE HARRISON.

Creditors Relief Act—Execution—Sheriff's Sale—Assignment for Benefit of Creditors—Rights of Subsequent Execution Creditors—R.S.O. 1914, ch. 81, sec. 6.

Section 6 of the Creditors Relief Act, R.S.O. 1914, ch. 81, applies to a case where the sheriff has realised money by sale of a debtor's property under execution, and made the entry required by sub-sec. 1, before the making by the debtor of a general assignment for the benefit of creditors; and the fund realised is divisible among all creditors coming in within the time limited by sub-sec. 2, although after the assignment.

Roach v. McLachlan (1892), 19 A.R. 496, and *Breithaupt v. Marr* (1893), 20 A.R. 689, distinguished on the ground that the sheriff's sale in the first case was *after* the chattel mortgage and in the second case *after* the assignment, and so the sheriff was selling the goods of the chattel mortgagee and of the assignee.

Dictum of MACLENNAN, J.A., in *Breithaupt v. Marr*, at p. 694, approved.

Order of the Judge of the County Court of the County of Essex reversed.

APPEAL by the McClary Manufacturing Company Limited from an order made by the Judge of the County Court of the County of Essex, on the 26th October, 1915, upon an application made by the appellants under sec. 33 of the Creditors Relief Act, R.S.O. 1914, ch. 81.

The learned County Court Judge found that a valid assignment for the benefit of creditors was made by George N. Harrison on the 17th February, 1915, pursuant to the Assignments and Preferences Act, R.S.O. 1914, ch. 134; that the executions of the Tooke Brothers Company Limited and the Metal Shingle and Siding Company Limited against the goods and lands of Harrison were completely executed by payment to the sheriff on the 16th February, 1915, after a levy and a sale made by the sheriff; and he ordered that the moneys in the hands of the sheriff should be distributed and paid by him according to the schedule of distribution prepared by him.

The grounds of the appeal were: (1) that there was no evidence to support the findings of the County Court Judge; (2) that the appellants were entitled to share in the moneys in the hands of the sheriff, and that the learned Judge was wrong in law in ordering distribution of the moneys in the sheriff's hands according to the schedule prepared by him.

November 29. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

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George S. Gibbons, for the appellants, argued that they were entitled to share in the moneys in the hands of the sheriff, and that the learned Judge erred in law in ordering distribution of the moneys in the sheriff's hands according to the schedule prepared by him. The learned trial Judge seemed to base his decision on the case of *Breithaupt v. Marr* (1893), 20 A.R. 689, following *Roach v. McLachlan* (1892), 19 A.R. 496. But these authorities did not apply, as in those cases the goods were still in the hands of the sheriff when the assignment had been made, whereas here goods had been sold, and the money, the proceeds of the sale, was in the sheriff's hands when the assignment was made. The appellants, as execution creditors, were entitled to share in these moneys.

G. A. Urquhart, for the first execution creditor, the Tooke Brothers Company Limited, and *H. V. Hattin*, for the second execution creditor, the Metal Shingle and Siding Company Limited, relied upon the judgment below, and contended that the circumstance that the sheriff had realised on the goods before the assignment did not prevent the application of the decisions in *Roach v. McLachlan* and *Breithaupt v. Marr*. Reference was made to *Clarkson v. Severs* (1889), 17 O.R. 592.

Gibbons, in reply.

November 30. The judgment of the Court was delivered by RIDDELL, J.:—An appeal from the judgment of Dromgole, Co.C.J., argued with great ability and candour on all sides.

The facts are simple. On the 14th November, 1914, the Tooke Brothers Company Limited placed a writ of execution in the hands of the sheriff against Harrison; on the 13th January, 1915, the Metal Shingle and Siding Company Limited placed another; on the 16th February, 1915, the sheriff sold and realised a considerable sum, upon that day making his entry, form 1, under R.S.O. 1914, ch. 81, sec. 6; on the 17th February, 1915, Harrison made an assignment for the benefit of creditors; on the 2nd March, 1915, the McClary Manufacturing Company Limited placed another execution in the sheriff's hands, and there were others within the time limited by sec. 6* (if that section apply).

*6.—(1) Where a sheriff levies money under an execution against the property of a debtor, or receives money in respect of a debt which has been attached or sold under the provisions of sec. 16 of the Absconding Debtors Act, he shall

The learned County Court Judge held that the assignment cut out the creditors filing their executions thereafter; and these creditors appeal.

It is said that the County Court Judge proceeded on the authority of *Roach v. McLachlan* and *Breithaupt v. Marr*; these are decisions of the Court of Appeal, and we are bound by them; but it is necessary to examine with care what they do decide and their *ratio decidendi*.

Breithaupt v. Marr, 20 A.R. 689, is decided expressly on the authority of *Roach v. McLachlan*, 19 A.R. 496; and it will be well to examine the facts of the leading case and the principle upon which it proceeds. An execution at the suit of Roach & Miller was placed in the hands of the sheriff against the goods of McLachlan; then the execution debtor made a mortgage of his goods to Robinson; the sheriff seized, and Robinson (and another) claimed the goods—the claims were abandoned so far as that the priority of Roach's execution was admitted, and the sheriff sold; certain creditors of the execution debtor sued, obtained judgment, and placed writs of execution in the sheriff's hands within the time limited by the Act; the County Court Judge held that they were entitled to share in the proceeds of the sale, and Roach & Miller appealed. The Court of Appeal proceeded upon the ground that the goods sold were not the goods of the debtor but of the chattel mortgagee. "When the sheriff sold under the first execution he was selling the goods, not of the debtor, but of the mortgagee:" p. 502, *per* MacLennan, J.A.: *cf. per* Osler, J.A., at p. 501.

So in *Breithaupt v. Marr*, 20 A.R. 689, the plaintiffs had judgment against Marr and execution placed in the sheriff's hands on the 18th July, 1893; the goods were seized the same day; on the 20th July, Beardmore & Co. and Park & Co. placed writs in the sheriff's hands; on the 26th July, Marr made an assignment for the benefit of creditors; and, after this, several creditors placed writs in the sheriff's hands; then the sheriff sold the goods; and

forthwith make an entry, form 1, in a book to be kept in his office open to public inspection without charge.

(2) The money shall thereafter be distributed ratably among all execution creditors and other creditors whose executions or certificates given under this Act were in the sheriff's hands at the time of the levy or receipt of the money, or who deliver their executions or certificates to the sheriff within one month from the entry.

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the Court of Appeal held that the Creditors Relief Act did not apply—but the reason given was that “it is the assignee’s property and not the debtor’s that the sheriff sells:” *per* Osler, J.A., at p. 693: see *per* Maclellan, J.A., at p. 694. Mr. Justice Maclellan, at p. 694, says: “If the money were realised and the entry made in the sheriff’s books before the assignment, it is possible that the fund might be divisible among all creditors coming in within the limited time.” *Turner v. Murray* (1893), 20 A.R. 690 (n.), is to the same effect.

Here the money is in the hands of the sheriff; the assignee has no property in it nor any right except after the sheriff has paid all claims duly made upon it; and the cases cited do not apply.

I cannot see why the provisions of the Act are not applicable; and would adopt the language of Mr. Justice Maclellan already cited, but deciding that to be law which he says is possible.

The appeal should be allowed with costs here and below.

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[IN CHAMBERS.]

Dec. 7.

RE OWEN SOUND LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-law—Petition for Submission of Repealing By-law—Liquor License Act, R.S.O. 1914, ch. 215, sec. 137 (4)—“Persons Qualified to Vote”—Ascertainment of Number on Voters’ List—Evidence—Persons Signing Petition—Percentage—Mandamus to Council—Status of Applicant—Officer of Corporation.

Section 137 (4) of the Liquor License Act, R.S.O. 1914, ch. 215, provides for the submission by the council to the municipal electors of a local option by-law or (see sub-sec. (8)) a repealing by-law, if a petition “signed by at least 25 per cent. of the total number of persons appearing by the last revised voters’ list of the municipality to be qualified to vote at municipal elections” is filed with the Clerk:—

Held, that in order to ascertain whether a petition duly filed is sufficiently signed; the number of *persons* who appear by the voters’ list to be qualified to vote is to be taken into consideration; if one-fourth of these *persons* have signed the petition, the statutory requirement is answered. The *name* of a person may be repeated once or oftener on the list, but that does not increase the number of *persons*.

The unimpeached affidavit of the applicant, upon a motion for a mandamus to the council to submit a repealing by-law, that the number of *persons* on the voters’ list was only 3,625, while there were *in name* 4,337, was accepted; and a mandamus was granted.

That the applicant was an officer or servant (auditor) of the municipal corporation was considered unobjectionable.

MOTION by Percy L. Greer for a mandamus to the Municipal Council of the Town of Owen Sound to prepare and submit to

the electors, on the next municipal polling-day, a by-law for the repeal of the local option by-law in force in the town.*

December 7. The motion was heard by RIDDELL, J., in Chambers.

James Haverson, K.C., for the applicant.

W. E. Raney, K.C., for the town corporation.

December 7. RIDDELL, J.:—A petition was presented to the Council of the Town of Owen Sound under the provisions of R.S.O. 1914, ch. 215, sec. 137 (4); filed with the Clerk on the 1st November, 1915; it contained the names of 1,003 “persons appearing by the last revised voters’ list of the municipality to be qualified to vote at municipal elections”—there were some other names, but that is not unusual in such cases, and is immaterial.

On the voters’ list are in name 4,337; but it is sworn and not contradicted that there are many cases in which the name of the same person appears more than once. The auditor of the town (the applicant) swears that the number of persons is only 3,625; affidavits are filed by the Mayor and Clerk, who do not contradict—all they say is that “no attempt has been made by me or the municipal council to ascertain the figures”—“I would not undertake of my own knowledge to determine the question.” No attack is made on the auditor, his good faith or his competency; no one even swears that he does not believe that his figures are substantially accurate. I think, then, he must be believed.

The main argument—in fact, the whole real argument—was directed, not to an attack upon the figures, but to support the principle followed by the Council, it is said on the advice of

*Section 137 (4) of the Liquor License Act, R.S.O. 1914, ch. 215, provides as follows: “If a petition in writing signed by at least 25 per cent. of the total number of persons appearing by the last revised voters’ list of the municipality to be qualified to vote at municipal elections is filed with the clerk of the municipality, on or before the 1st day of November next preceding the day upon which such poll would be held”—that is, the day upon which a poll would be held at the annual election of members of the council (sub-sec. (3))—“praying for the submission of such proposed by-law it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid.” By sub-sec. (8), the provisions of sub-sec. (4) apply to a repealing by-law.

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their solicitor—i.e., that there can be no inquiry of any kind as to the number of persons, all that can be looked at is the apparent number of names.

I do not think that this is the correct interpretation of the Act. The petition is not signed by “names,” but by “persons,” and a sufficient number of “persons” must sign to make up at least 25 per cent. of the total number of “persons” appearing to be qualified to vote, etc. To my mind, it is quite clear what is meant—find out the number of persons who appear by the voters’ list to be qualified to vote; then, if one-fourth of these persons sign the petition, it will answer the requirements of the statute.

That the name of a person may be repeated once or oftener is *nihil ad rem*—that would not increase the number of persons.

The argument *ab inconvenienti* does not much appeal to me—if the Council really desired to find the number of persons, it could be done, at least substantially and with sufficient accuracy for the present purpose, with little trouble and expense—in this instance no attempt was made—no doubt by reason of the solicitor’s advice.

An objection was taken that the applicant was an officer or employee of the corporation. I cannot see any force in the objection. Any one by becoming the auditor of a town does not give up his ordinary rights as a ratepayer or as a British subject and a freeman—he may advocate prohibition or license or free trade in liquor as his conscience may dictate—he may pay as much and as little attention to public opinion as he thinks it deserves. Whatever may be the case elsewhere, we boast that our country is a land where girt by friend or foe a man may say the thing he will—*fiat æternum*.

The applicant asks for a mandamus; I think he is entitled to it, and with costs.

[RIDDELL, J.]

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Dec. 7.

Executors and Administrators—Charges and Expenses—Allowance by Surrogate Court Judge—Costs of Action Unsuccessfully Defended—Reasonableness of Defence—Direction of Judge at Trial of Action—Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 19.

Where a man defends an action brought against him as executor and fails, he may be forced to pay the costs out of his own pocket; but he is entitled to be allowed, out of the estate in his hands as executor, all reasonable expenses which have been incurred in the management of the estate, and these include the costs of an action reasonably defended.

A Surrogate Court Judge, when asked to allow an executor such costs, must deal with them as charges and expenses; and the direction of the trial Judge in the action in which such costs were incurred, as to allowance out of the estate or otherwise, cannot bind the Surrogate Court Judge.

Section 19 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, considered.

In re Beddoe, [1893] 1 Ch. 547, followed.

Where the plaintiffs' costs of an action brought against an executor as such were, by the judgment in the action, ordered to be paid by the executor, and were so paid, the allowance by the Surrogate Court Judge to the executor, on his passing his accounts, of the sum so paid, and also his own costs of defending the action, was affirmed—there being nothing to shew that the action was unreasonably defended.

AN appeal by Jane Coulson, under sec. 34 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, from the allowance by the Judge of the Surrogate Court of the County of Prince Edward to the executor of the will of Jane Dingman, deceased, upon the passing of his accounts, of his costs of defending an action brought by the appellant and her husband against the executor, in which the executor was unsuccessful, and also the costs of the plaintiffs in that action, which was in the Supreme Court of Ontario, paid by the executor, as adjudged in that action.

December 6. The appeal was heard by RIDDELL, J., in the Weekly Court at Toronto.

E. G. Porter, K.C., for the appellant.

Gideon Grant, for the executor, respondent.

December 7. RIDDELL, J.:—The late Jane Dingman left her last will and testament, the provisions of which made Jane Coulson entitled to one-fifth of the residuary estate. Jane Coulson

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claimed against the estate a sum of \$1,200, which she said the testatrix had promised her if she would care for her for life; on this being disputed, she and her husband sued; the executor defended the action; it was tried at Belleville before the Chancellor and a jury, resulting in a verdict for the plaintiffs for \$1,000—the Chancellor directed a judgment to be entered for \$1,000, and “that the defendant do pay to the plaintiffs their costs of this action forthwith after taxation thereof.”

The executor, in passing his accounts before the Surrogate Judge at Picton, claimed to be allowed not only his own costs of defending the action, but also the costs he paid under the said judgment; and his claim was allowed.

Jane Coulson now appeals under R.S.O. 1914, ch. 62, sec. 34.

Upon the hearing I offered to send the matter back to the Surrogate Judge that he might take evidence as to the reason for defending the action, etc.—no evidence had been in fact taken before him—but neither party would assent to this. The case, therefore, falls to be decided on the facts above set out and no others.

It is one of the disadvantages of an executor’s position that, if he defend an action brought against him as such executor and fail, he may be forced to pay the costs out of his own pocket: *Macdonald v. Balfour* (1893), 20 A.R. 404; but he is entitled to be allowed all reasonable expenses which have been incurred in his management of the estate, and these include the costs of an action reasonably defended. Of course he could not be allowed the costs of improperly defending an action: *Chambers v. Smith* (1846), 2 Coll. 742; *Smith v. Chambers* (1847), 2 Ph. 221; but to disentitle him there must be something proved to shew the unreasonableness.

“A trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred. . . . The words ‘properly incurred’ . . . are equivalent to ‘not improperly incurred’ . . .” *In re Beddoe*, [1893] 1 Ch. 547, at p. 558, *per* Lindley, L.J. He “is entitled to costs in the ordinary way . . . unless it is established that he has been guilty of some misconduct.” *In re Love* (1885), 29 Ch.D. 348, at p. 350, *per* Cotton, L.J.

Nothing is established here—the plaintiffs in the action in the Supreme Court may have acted in such a suspicious way as to necessitate a defence—the executor may have had information which made it apparently certain that the claim was unfounded—witnesses may have failed—counsel unfortunate—jury prejudiced—a hundred facts may have been in existence justifying a defence.

The fact that there is no provision in the judgment in the Supreme Court for the defendant's costs is *nihil ad rem*—it is the usual thing to order the defendant, executor though he be, to pay the costs to the successful plaintiff: formerly it was a very common practice to direct that the costs so paid and his own might be retained by the executor out of the estate. That practice is not now so common; and, at least since the Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 19 (R.S.O. 1914, ch. 62, sec. 19),* it may well be doubted that such a direction is valid. But, in any case, these are not costs in the action at all, as was pointed out by Lindley, L.J., in *In re Beddoo*, [1893] 1 Ch. at p. 555: "When you ask a Chancery Judge to allow those costs to the defendant who has been unsuccessful, those costs immediately assume the character of charges and expenses:" Substitute for "Chancery" the word "Surrogate" and we have our case—the Surrogate Judge, when asked to allow those costs, must deal with them not as costs but as charges and expenses. He must exercise his independent judgment, and no direction of a trial Judge can bind him.

In *In re Beddoo*, a plaintiff had brought an action in the Queen's Bench Division against the executor as such, and succeeded—"judgment was given for the plaintiff, with costs to be paid by the defendant Downes," the executor (p. 548)—then proceedings were taken in the Chancery Division to determine, amongst other things, what right Downes had to retain out of the residuary estate his costs. Kekewich, J., held "that

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*19. Subject to the provisions of the Judicature Act, all jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the property of deceased persons, and all matters arising out of or connected with the grant or revocation of grant of probate or administration, shall be exercised in the name of His Majesty, in the several Surrogate Courts.

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the amount of the taxed costs paid by . . . Downes to the plaintiff in the action in the Queen's Bench Division . . . and also the costs of the said . . . Downes in the same action, as between solicitor and client, ought to be allowed to the said . . . Downes as costs, charges, and expenses properly incurred” Upon an appeal, the Court of Appeal held that the matter was properly appealable, thought that on the admitted facts the action should not have been defended, and allowed only such costs as would have been incurred on an application for leave to defend. But the fact that the judgment contained no provision allowing the executor to retain his costs, etc., is not even referred to—and indeed the Justices of Appeal declined to be governed by the language of the Commissioner who tried the action, and who said that he saw nothing unreasonable in the executor's conduct—for “the . . . matter is at large for us.” The Commissioner said, as a trial Judge with us would say: “I have not to deal with the question which will arise hereafter, whether the trustee is entitled to retain and charge these costs against the trust estate . . . that matter must be disposed of when it arises by the proper tribunal.” So in this case, the Chancellor had not to deal with the right to retain and charge the costs against the trust estate: that was to be decided by the proper tribunal—in this case by the Surrogate Judge.

The appeal should be dismissed with costs.

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Dec. 8.

[APPELLATE DIVISION.]

RE GARNHAM'S CONVICTION.

RE RICHARDSON'S CONVICTION.

Municipal Corporations—Hawkers and Pedlars' By-law—Magistrate's Conviction—“Sale” of Coal Oil—Municipal Act, R.S.O. 1914, ch. 192, sec. 416—5 Geo. V. ch. 34, secs. 32, 33.

The decision of MEREDITH, C.J.C.P., 34 O.L.R. 545, was reversed, and the convictions of two servants of an oil company for offences against a hawkers and pedlars' by-law of a county, quashed, upon the ground that the acts of the accused—obtaining from purchasers orders on the oil company to ship to the purchasers named quantities of oil, to be delivered at the places named in the orders, cash on delivery—did not constitute a “sale” within the meaning of the by-law, which followed

the wording of sec. 416 of the Municipal Act, R.S.O. 1914, ch. 192, as amended by 5 Geo. V. ch. 34, secs. 32, 33.
Rex v. St. Pierre (1902), 4 O.L.R. 76, and *Rex v. Pember* (1912), 3 O.W.N. 1216, followed.

APPEALS by S. A. Garnham and A. E. Richardson from orders made by MEREDITH, C.J.C.P., in Chambers, refusing to quash convictions of the appellants by the Police Magistrate for the City of Woodstock. The reasons of MEREDITH, C.J.C.P., are reported: 34 O.L.R. 545. Leave to appeal was granted by SUTHERLAND, J.: see 9 O.W.N. 172.

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November 29. The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. S. Gibbons, for the appellants, said that the whole question was whether or not there had been a sale of the oil within the meaning of sec. 416 of the Municipal Act, R.S.O. 1914, ch. 192. He argued that there had not been a sale; that the defendants merely took orders for future delivery. Their masters were not bound to accept these orders, and without acceptance there could not be a sale. He referred to and relied upon the cases of *Rex v. St. Pierre* (1902), 4 O.L.R. 76, and *Rex v. Pember* (1912), 3 O.W.N. 1216. There was no evidence to shew that samples had been carried, and so the amendment of 5 Geo. V. ch. 34, secs. 32 and 33, did not apply.

W. Lawr, for the respondent, contended that there had been a sale. The forms of contract entered into amply shewed this. He relied upon the judgment below and the reasons therefor, and cited *Rex v. Borrer* (1915), 9 O.W.N. 64.

Gibbons, in reply.

December 8. RIDDELL, J.:—An appeal in two cases (which are identical in their facts and will be treated as one) from the judgment of the Chief Justice of the Common Pleas.

The information was for violating by-law No. 550 of the County of Oxford, the hawkers and pedlars' by-law. The defendants were convicted by the Police Magistrate for the City of Woodstock—"being an agent for the Columbus Oil Company of Columbus, Ohio, and taking orders for coal oil in the . . . County of Oxford, without having first obtained a license so to

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do." Motions to quash the convictions were dismissed by the learned Chief Justice, on the short ground that there was a sale of coal oil within the county.

On an application for that purpose at the London Weekly Court, Mr. Justice Sutherland gave leave to the defendants to appeal to this Court, "in view of the recent amendment of the law and of the importance in a general way of its application."

The by-law is in a usual form, prohibiting hawkers acting without a license, etc. The clause relied upon by the prosecution is as follows: "2. That, in accordance with section 583 of the Consolidated Municipal Act of 1903, the word "hawkers" in this by-law shall include all persons being agents for persons not residing within the county who sell or offer for sale . . . coal oil . . . or carry and expose samples or patterns of any of such goods to be afterwards delivered within the county . . ." Another clause forbids "taking orders for coal oil . . . to be delivered afterwards from a tank car. . . ."

The evidence, when read in the light of the exhibits, shews that the *modus operandi* was to obtain from the purchaser an order on the Columbus Oil Company of Columbus, Ohio, to ship to the purchaser a named quantity of oil, to be delivered at a place named in the order, cash on delivery. There is no evidence of sale beyond this, and nothing to indicate sale by sample or delivery from a tank car. That this is not a "sale" within the meaning of the Act, and consequently not an offence, *Rex v. St. Pierre*, 4 O.L.R. 76, decides. A Divisional Court of the High Court approved and followed this decision in *Rex v. Pember*, 3 O.W.N. 1216. The carrying of samples is not proved or suggested, and the amendment of 1915 does not apply.

I think the appeal should be allowed with costs throughout.

FALCONBRIDGE, C.J.K.B., and KELLY, J., concurred.

LATCHFORD, J.:—The convictions in these cases have been upheld on the ground that the defendants sold coal oil within the county of Oxford without having obtained a hawker's license.

The transactions were not sales by sample. They were not

sales in fact, but only in form. They were merely orders for future delivery; and such orders the by-law prohibits only in cases where the delivery is to be made from tank cars—a circumstance absent in both the cases.

The defendants were not prohibited from taking such orders as the evidence shews they did take, and the appeals should be allowed with costs here and in the Court appealed from.

Appeals allowed.

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[APPELLATE DIVISION.]

RE TORONTO AND YORK RADIAL R.W. CO. AND CITY OF TORONTO.

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Street Railway—Agreements with Municipal Corporations—Construction—Ontario Statutes 40 Vict. ch. 84, 56 Vict. ch. 94, 60 Vict. ch. 92—Ontario Railway Act, R.S.O. 1914, ch. 185, secs. 105(8), 260(1)—Right of Deviation from Highway—Approval of Plans—Order of Ontario Railway and Municipal Board—Jurisdiction—Submission of Plans to Municipal Officials—Necessity for.

An order of the Ontario Railway and Municipal Board allowing an application made by the railway company for the approval of certain plans of tracks by way of deviation from its existing line along Yonge street in the city of Toronto, to a proposed station on land adjoining that street—the *locus* having been annexed to the city of Toronto in 1908—was reversed on appeal, upon the ground—according to the opinion of the majority—that no plan of the proposed deviation was ever submitted to or approved by the municipal officials of either the county or the city.

Per GARROW, J.A.:—Such a plan, so approved, is expressly made by the terms of the agreement dated the 25th June, 1884, made between the railway company and the Corporation of the County of York, validated by 56 Vict. ch. 94(O.), the very basis of all the work to be afterwards undertaken upon the highway; and its production and approval cannot be dispensed with by the Board.

The decision of FALCONBRIDGE, J., in *City of Toronto v. Metropolitan R.W. Co.* (1900), 31 O.R. 367, and the decision of the Privy Council in *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315, applied.

The following agreements and statutes were considered: 40 Vict. ch. 84 (O.), incorporating the Metropolitan Street Railway Company of Toronto; the Railway Act, C.S.C. ch. 66, and amendments; the agreements of the 25th June, 1884, and 20th January, 1886, validated by 56 Vict. ch. 94; the agreement of the 6th April, 1894, validated by 60 Vict. ch. 92; the Ontario Railway Act, R.S.O. 1914, ch. 185, secs. 105 (8) and 260 (1).

Per HODGINS, J.A.:—

(1) The statute 40 Vict. ch. 84 does not incorporate the sections of the Railway Act, C.S.C. ch. 66, relied on by the Board, so as to enable the powers therein given to be exercised except outside the (present) limits of the city.

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- (2) Those limits are the limits existing when any application is made in regard to which reliance is placed, for the right to exercise the desired powers, on the sections referred to.
- (3) The rights of the railway company are to be put in force only under and subject to the agreements which it from time to time makes with the municipalities concerned; the agreements define the rights with which the railway company is clothed, in the absence of express legislation.
- (4) The municipalities concerned are those which have jurisdiction over the streets and highways in question when an agreement is actually made.
- (5) The Corporation of the County of York had, on the date when the 1894 agreement became effective—the 25th October, 1896—lost jurisdiction over the portion of Yonge street in question, and the Corporation of the Township of York then possessed it.
- (6) The township corporation was not shewn to have given any permission or agreement while it had such jurisdiction.
- (7) That portion of Yonge street passed to the city corporation in 1908 unaffected by the provisions of the 1894 agreement.
- (8) That agreement, even if it bound the city corporation, did not, under any of its terms, or under any that ought to be implied, comprehend such a deflection as was allowed here.
- (9) The Board had no power or authority, either under any agreement already made, or under any statute, to make the order appealed from, giving the right to connect with terminals or with tracks and buildings on the lot in question for the accommodation of passengers and freight.

APPEAL by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board allowing an application made by the railway company for the approval of certain plans of tracks by way of a deviation from its existing line along Yonge street in the city of Toronto, to a proposed station on land adjoining that street.

September 29. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., and KELLY, J.

G. R. Geary, K.C., and *Irving S. Fairty*, for the appellant corporation.

I. F. Hellmuth, K.C., and *C. A. Moss*, for the railway company, the respondent.

The arguments of counsel sufficiently appear in the judgments.

December 9. GARROW, J.A.:—This is an appeal by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board allowing an application made by the railway company for the approval of certain plans of tracks by way of a deviation from its existing line along Yonge

street in the city of Toronto, to a proposed station on land adjoining that street.

The city corporation resists the application on two grounds: (1) that the railway company has no franchise in respect of the street and adjoining land proposed to be used; and (2) that, in any event, the consent of the municipal council of the city is necessary.

By the statute of Ontario 40 Vict. ch. 84 (1877), the Metropolitan Street Railway Company of Toronto was incorporated and (sec. 8) authorised to construct, maintain, complete, and operate a double or single track iron railway, with the necessary side-tracks and turn-outs, for the passage of cars, carriages, and other vehicles, upon and along such streets and highways and railway tracks or lines within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities as the company might be authorised to pass along, under and subject to any agreement thereafter to be made between the municipal councils and the railway company, as to construction, maintenance, and repairs of roadway and renewal thereof, and grade, style of rail, and all other matters and things relating to roadway and works, and under and subject to any by-laws of the municipalities or any of them, and to take, transport, and carry passengers, and, outside the limits of the city of Toronto, freight, and to use and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith.

By sec. 2, the several clauses of the Railway Act, C.S.C. ch. 66, and the amendments thereto, with respect to, among other things, "powers," "plans," "surveys," "lands and their valuation," were by reference incorporated, but as to the matters above enumerated only as regards the portion of the railway outside the limits of the city of Toronto.

Pursuant to the statute, by an agreement dated the 25th June, 1884, made between the railway company and the Corporation of the County of York, validated by 56 Vict. ch. 94, the company was authorised to place and maintain its railway upon and along Yonge street, on its westerly side, between the macadam or gravel and the ditch, from the northerly limit of

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the city of Toronto to the town-hall at Eglington (subsequently extended northerly to Lake Simcoe), which covered and included that portion of Yonge street now in question. But, by clause 5 of the agreement, it was provided that "the location of the line of railway in the said street or highway shall not be made until the plans thereof shewing the positions of the rails and other works on said street shall have been submitted to and approved of by the warden, county commissioners, and engineer." And under and in accordance with that agreement the tracks were laid upon Yonge street, and the railway, which was then authorised to use horse power only, was for a considerable period operated.

By the statute 56 Vict. ch. 94, an extension northerly of the railway and the use of electricity for power were authorised. In pursuance of that statute, a further agreement, dated the 6th April, 1894, was entered into between the railway company and the county, which was validated by 60 Vict. ch. 92, in the schedule to which the agreement is set out. And it is under the provisions of that agreement that the learned Chairman of the Board, as expressed in his judgment, reached the conclusion that the company is authorised to make the deviation now proposed.

The only clauses directly bearing upon the subject seem to be 7 (3) and 11. 7 (3): "Construct, put in and maintain such culverts, switches and turn-outs as may from time to time be found to be necessary for the operating of the company's line of railway on Yonge street, or leading to any of the cross-streets leading into or from Yonge street, or for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge street, where the company's line deflects from Yonge street, or to the company's power-houses and carsheds. . . ." 11: "The company may deflect its line from Yonge street and operate the same across and along private properties after expropriating the necessary rights of way under the provisions of the statutes in that behalf."

Clause 3 should also be looked at. It provides for the approval by the county corporation, before work upon the exten-

sion hereby authorised is commenced, of plans shewing the proposed location of the tracks; which is not in principle unlike the provisions of clause 5 of the first agreement before set out.

There were other agreements between the parties, most, if not all of them, referred to and validated by the statutes to which I have referred, but their provisions have apparently no direct bearing upon the question now before us.

The northerly boundary of the city was extended northwards in the year 1888, and again still further north in the year 1908, the latter extension including the present *locus in quo*.

By sec. 6 of 60 Vict. ch. 92, the rights of the company existing at the date of any northerly extension of such boundary were declared to be unaffected by such extension; which, as I understand it, means that such rights, whatever they were, were neither to be abridged nor enlarged by such extension. If the right claimed existed against the county, it continued to exist, and could be asserted against the city in the territory so annexed. But, if the consent of the county, while the territory was in the county, was necessary to give effect to the right claimed, a like consent by the city would afterwards be necessary and must be shewn.

The learned Chairman did not point out what particular clause of the agreement he relied upon, but it must have been one or the other of those which I have quoted. If it was clause 11, I incline to think that its proper construction does not and was not intended to authorise a partial removal of the tracks from Yonge street. And, if it was clause 3, the express enumerations and descriptions omitting "station" or "depot" seem to be against the contention of the company. I would prefer, however, not to pronounce a final opinion upon these questions of construction, because it seems to me that the application fails upon another ground, alike applicable whether the power asserted is to be regarded as specific or general, or even necessarily to be implied, to which I have so far seen no answer; and that is, that, as far as appears, no plan of the proposed deviation and extension was ever submitted to or approved by the municipal officials of either the county or the city.

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Such a plan, so approved, is expressly made by the terms of the agreement which I have quoted the very basis of all the work to be afterwards undertaken upon the highway. And its production and approval cannot, in my opinion, be dispensed with by the Board. It is not the case of a violated agreement under sec. 260 (1) of the Ontario Railway Act, R.S.O. 1914, ch. 185; while, under sec. 105, sub-sec. 8, the Board is powerless to alter or affect the number or *location* of the tracks agreed on.

The case is really within the principle applied in the recent case between the same parties in the Privy Council on appeal from the old Court of Appeal, *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315; and by Falconbridge, J., in *City of Toronto v. Metropolitan R.W. Co.* (1900), 31 O.R. 367. In both cases the real question was, as it is here, primarily one of locality.

In the view I have expressed, it is not, I think, necessary to pronounce any opinion upon the situation presented by the transfer of that portion of the highway in question by the county corporation to the Corporation of the Township of York, nor the effect to be given under the circumstances to the confirmation contained in sec. 15 of 60 Vict. ch. 92.

The appeal should, in my opinion, be allowed with costs.

MACLAREN, J.A.:—I agree in the result.

MAGEE, J.A.:—I agree.

HODGINS, J.A.:—The former application of the respondent, which was granted by the Ontario Railway and Municipal Board, and whose order was set aside by this Court, *Re City of Toronto and Toronto and York Radial R.W. Co.* (1913), 28 O.L.R. 180, affirmed by the Judicial Committee, *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315, was for permission to deviate from the present tracks of the respondent on Yonge street to its private right of way, necessitating the crossing of the sidewalk on the west side of Yonge street, and to connect with tracks upon a lot on the south-west corner of Yonge street and Farnham avenue. These

tracks led across several streets, and ended at proposed terminals some distance to the south. The respondent was held to have no right to deviate in the way proposed, because (1) it was not in conformity with the obligation created by the agreements of the 25th June, 1884, and 20th January, 1886, and (2) because the proposed line was neither a deviation nor a deflection within the meaning of the statutes quoted in the argument before the Privy Council relative to the powers of railway companies in general, or the railway company in particular, but was a new line which the company was desirous of constructing and operating without having any franchise or statutory authority so to do.

That decision was based upon the rights of the Corporation of the City of Toronto in regard to that portion of the respondent's line south of the north limit of the city of Toronto, as fixed by the proclamation of the 24th September, 1887, which became effective on the 1st January, 1888.

With regard to the section of the line which lay to the north of that limit, their Lordships in the Privy Council made the following remarks (25 O.W.R. at pp. 318, 319): "Their Lordships do not feel called upon to decide whether, as against the Municipality of the County of York, the appellants acquired the right to make the line in its new position, or whether its so doing would be consistent with their duties, or within their powers in other respects, because they are of opinion that nothing done under the powers of this agreement can in any way affect the rights of the respondents with regard to the portion of Yonge street owned by them and situated within their own jurisdiction."

It will be observed that the request of the respondent, which has now been granted by the Ontario Railway and Municipal Board, as evidenced by the approval of the plans, differs from the former application in that, although the deviation into and on the property at the south-west corner of Yonge street and Farnham avenue is exactly the same in its actual location, it is limited to a deviation into the respondent's property for specific purposes, and does not purport to be a new line such as was

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then objected to. It stops short of crossing any street south of Farnham avenue.

The application before Falconbridge, J., in *City of Toronto v. Metropolitan R.W. Co.*, 31 O.R. 367, on being examined in connection with the plan then used, discloses the fact that what the appellants were then endeavouring to do was to cross from their line into a lot owned by the Canadian Pacific Railway Company, and that the permission they sought was only to run a curve from their rails across the sidewalk to reach that lot where the tracks of the Canadian Pacific Railway Company were already laid.

Thus the three applications involve exactly the same sort of physical connection, i.e., the two last a short curve or deflection across the west sidewalk from a track lying on the west side of Yonge street into property lying to the west of the street line, and the earlier one a curve from the track to property on the east side of Yonge street.

The appellant asserts, therefore, that this application is essentially the same as the two previous ones, and that the remarks of their Lordships in the later case are descriptive of it, notwithstanding its altered form. Those remarks are as follows (25 O.W.R. at p. 319): "The object and effect of the proposed plan is plain. The company desired by it to take the line off Yonge street without obtaining the consent of the municipality, and it was not concealed from their Lordships in the argument that it would in future be contended that, thereafter, they would not be using the franchise or privilege obtained by the agreements of 1884 and 1886, or be affected by the fact that such franchise and privilege would terminate in June, 1915."

This is supported by the suggestion made on the hearing that, if this order is upheld, the respondent, having secured the right to cross into its private property, will contend that it becomes a deviation sanctioned by the general powers applicable to railway companies, and that either the respondent or some other railway company will, as a natural consequence, be in a position to secure the right to cross the streets to the south, and, by effecting a junction with the tracks connected with this crossing, accomplish in that way what was refused before, and

make connection with other railways. The agreement between the appellant and respondent in 1903—a copy of which has been supplied since the argument—whereby the respondent secured the right to cross the sidewalk into lands of the Canadian Pacific Railway Company, contained the following stipulation: “The company covenants with the city that it will not join or unite its tracks or permit a junction or union to be made during the currency of this agreement with the tracks, branch line or switches of the said Canadian Pacific Railway Company, or of the Toronto Railway Company, or of any other railway company within the limits of the city of Toronto.”

This covenant is not provided for in the order appealed from.

The importance of the appellant's objection is thus apparent, and the right claimed cannot be called trifling. Since 1888, the city of Toronto has again, in 1908, enlarged its borders, taking in part of the county of York, known as Deer Park, which territory lay just to the north of the city limits of 1888. Hence the portion of Yonge street and the respondent's tracks thereon lying to the north of the limit of 1888, have been, since the 15th December, 1908, and now are, within the corporate limits of Toronto, and that highway has become, for some distance to the north of the important point here, a city street. The County of York, by by-law No. 712, passed on the 6th February, 1896, and confirmed by order in council dated the 23rd September, 1896, pursuant to the Consolidated Municipal Act, 1892, sec. 566, sub-sec. 7, parted with its title to the highway itself, which thus became the property of and owned as a public highway by the Township of York. It is not shewn that the Township of York has consented to what is here proposed.

The application of the respondent to the Ontario Railway and Municipal Board, on which the order appealed from was made, is, in its amended form, expressed as follows:—

“1. The applicant is a railway company operating, among other lines, the line known as the Metropolitan Division from the old north city limit in the city of Toronto to Jackson's Point and intermediate stations.

“2. The applicant, pursuant to its powers in that behalf, has

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acquired property and private right of way as shewn on the plan filed for the purposes of its terminal, freight-sheds and car-sheds.

"3. The applicant submits plans shewing proposed switches or deviations into the said property or right of way to be used by the company for the purpose of providing the necessary switches and turn-outs to the company's property required by the company in its operation and for the accommodation of its passengers, freight and cars, and desires approval thereof."

What the Board have sanctioned is a plan which shews nothing but two buildings, not designated in any way; one connected by a track to the rails on Yonge street and one unconnected and standing by itself, also two tracks, likewise unconnected with anything, but ending near the south-west corner of the lot on the corner of Farnham avenue and Yonge street. The plan does not suggest that either of the buildings could be used as car-sheds.

The order made by the Board is as follows: "The application for the approval of the plans having been amended to shew the purpose for which such switches or deviations are required by the applicant, namely, for the purpose of providing the necessary switches and turn-outs to the company's property required by the company in its operation and for the accommodation of its passengers, freight and cars: This Board doth order that the said plans as amended be and the same are hereby approved."

The reasons of the Board speak of what is being approved as "a terminal including tracks and buildings for the accommodation of its passengers and freight," and refer to the sections of the old Railway Act, which, it is said, are incorporated by reference into the company's Act of incorporation, and to the provisions of the agreement of the 6th April, 1894, as giving authority in that behalf. "Terminal" is a word not found in any Act or agreement dealing with the respondent, and is a word of elastic meaning, as is the expression "buildings for the accommodation of its passengers and freight." What "terminals" may include can be seen by considering the provisions of an Act, 6 Edw. VII. ch. 170 (D.), incorporating the Toronto

Terminals Railway Company, and by reference to the case of *Pennsylvania R.R. Co. v. Marshall* (1911), 147 N.Y. App. Div. 806.

This Court has, I suppose, little to do in this case with the character or sufficiency of the evidence before the Board; but, in reading it over to understand what caused the Board to use the language employed in its order, it seems that there is not much in it to indicate what these words actually mean, and what the respondent really intends to do. It is necessary, therefore, to determine whether, taking the words as they stand, the order is justified.

It must be borne in mind, in dealing with this appeal, that the rights of the respondent upon and in relation to Yonge streets are primarily governed by the principle laid down in the case already referred to in the Privy Council, and emphasised in the cases of *Toronto Electric Light Co. v. City of Toronto* (1915), 33 O.L.R. 267, and *Weir v. Hamilton Street R.W. Co.* (1914), 32 O.L.R. 578, reversed in the Supreme Court of Canada, *Hamilton Street R.W. Co. v. Weir* (1915), 51 S.C.R. 506. This principle is, that the respondent possesses the right to maintain and operate the street railway on Yonge street solely under and subject to any agreement made between the respondent and the municipalities affected, and to any by-laws made in pursuance thereof, and that it is bound, in respect to such privilege and franchise, by all the terms and conditions thereof. The "location" and its removal and change are things specially mentioned in the Act of incorporation as the subject of such an agreement.

By that Act, 40 Vict. ch. 84, sec. 17, the respondent's powers are to remain in abeyance until the agreements provided for in the Act shall have been entered into; and it follows that their exercise is to be measured by what is contained therein. Those agreements are to deal, *inter alia*, with the location of the railway and the particular streets along which the same will be laid, together with many details.

The rights and privileges defined under the agreement of the 25th June, 1884, expired on the 15th June, 1915, according to its terms, but for some reason the respondent still maintains

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that that agreement has some vitality. It recites the powers of the company very fully, and recognises in so many words that the occupation of the streets is dependent on the consent of the municipality and upon such conditions as might be agreed upon. It enabled the respondent to construct its track on the west side only of Yonge street, but the location was not to be made until plans shewing the position of the rails and other works on Yonge street were approved by the warden, county commissioners, and engineer, and it gave the respondent the exclusive right in and upon that portion of Yonge street. The switches and turn-outs—which is the expression that replaces “side-tracks and turn-outs”—permitted by the Act of incorporation, were not to exceed 100 feet in length, nor to be more than 4 in number, and the respondent was bound to extend the macadam 16 feet beyond the outer rail—a provision manifestly inapplicable to crossing the sidewalk on the west side.

It was held by the Privy Council that it was solely under this agreement and that of the 20th January, 1886 (relating to an extension northward from the northern terminus under the 1884 agreement), that the right arose to maintain and operate the street railway along the portion of Yonge street referred to in that case, which includes the section from which the proposed crossing tracks extend. The statement in the reasons of the Ontario Railway and Municipal Board that the construction of the tracks where the proposed deflection leaves them was done under the agreements referred to in those reasons, is inaccurate, if it is intended to include that of 1894. The track at the point in question had been laid down and operated prior to the agreement of the 28th June, 1889 (see that agreement).

I find nothing in those agreements to authorise the change proposed, and I think that the practical effect of the judgment in the Privy Council is to prevent the deviation sought in this case, so far as the appellant is concerned. The only reservation of opinion by their Lordships is that already quoted, viz., whether, under a subsequent agreement of 1894, and as against the County of York, the respondent had acquired the right to construct the deviation, or whether its doing so would be consistent with its duties or within its powers in other respects.

Here the City of Toronto has become the owner of Yonge street, and the street is now within its jurisdiction, although not so when the 1894 agreement was made. It must be remembered that the right of the respondent upon the streets is dependent upon authority derived from the council which has jurisdiction over the street in question, and not upon ownership as a necessary element; and this is the effect of sec. 8 of the Act of incorporation and of all subsequent provisions; so that, unless a right to do the specific thing now asked can be found in subsequent legislation which takes it out of the earlier restriction, the authority to permit it must reside in the council having jurisdiction over the street, i.e., in this case, that of the City of Toronto. But, as it was argued that powers were afterwards granted by agreement and legislation, it is necessary to consider them.

The agreement of the 28th June, 1889, and the 17th December, 1889, only emphasise the limited rights possessed by the respondent as to switches and turn-outs. The Act of 1897, 60 Vict. ch. 92, by sec. 4, permits the carrying along and the operating of the railway upon such streets and highways "as have been or may be authorised by the respective corporations having jurisdiction over the same, and . . . under and subject to any agreements between the company and the councils of any of the said corporations."

This indicates that jurisdiction is again the test. Section 6 deals with the sale of electric power, etc., and its proviso is, I think, limited to what is conferred by the section. But, if not, it merely preserves the respondent's rights such as they are, and these, by sec. 4, are what I have quoted. There is no limitation of jurisdiction in the proviso, and these rights cannot include it. At the date of the passing of this Act, i.e., the 13th April, 1897, the ownership of the part of Yonge street now in question had passed to the Township of York, under the by-law passed on the 6th February, 1896, and the order in council of the 23rd September, 1896, already referred to, and it had also come within the jurisdiction of that municipality. When the agreement of 1894 was made, this was not the case. But it appears by

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a subsequent agreement of the 7th February, 1896, that the respondent had failed to complete its railway to Richmond Hill before the 1st October, 1895. The result of that may be important as to the powers of the county council. By the earlier agreement of 1894 (clauses 34 and 40), that failure annulled the agreement, and set up the older agreements as those binding both on the county and the railway company.

Before the second agreement was made, which purported to extend the time for completion until November, 1896, the county had passed a by-law transferring the portion of Yonge street within the township of York to that municipality; and, so far as it could, the County of York had divested itself of jurisdiction over it. It is true that this by-law was passed only one day earlier than the date of the 1896 agreement, but by the fourth paragraph of that agreement it is stated that the extension agreement should not be operative until a deposit of \$1,000 or a bond in lieu thereof was made by the railway company with the county treasurer. This bond was actually deposited on the 25th October, 1896, according to information supplied by the respondent since the hearing. The by-law of the county was not effective until the Lieutenant-Governor in Council had assented to it (1892, 55 Vict. ch. 42, sec. 566, sub-sec. 7); but it is doubtful whether the county could effectively deal with that portion of the road in question so as to burden it with a franchise or privilege pending confirmation, to the disadvantage of the minor municipality. However, whether the forfeiture was actually claimed or not, it existed, and the older agreements were, in terms, revived. A formal contract to avoid the effect of the clauses of the 1894 agreement was required; and, before that had been made, the jurisdiction had been actually transferred, by virtue of the statute, on the 23rd September, 1896, the date of the order in council.

It appears to me that, in these circumstances, and in view of the terms of secs. 4 and 15 of the Act of 1897 (60 Vict. ch. 92), under which latter section the agreements were only then confirmed, and not as of their respective dates, the County of York had no power to authorise any additional tracks, switches, or

turn-outs upon Yonge street, or any deflection across the sidewalk within the limits of the township of York.

But, if it had that power, the words of clauses 7 and 11 of the agreement confirmed by 60 Vict. ch. 92, which are relied on by the Ontario Railway and Municipal Board, do not seem to me to authorise what is proposed. Sub-clause 1 of clause 7 of the agreement is apparently only intended to deal with the added extensions provided for by the Act and the agreements, because, as to the portion now in question, the expression "may be occupied" is not appropriate to a line then in operation, but is correct as to the extension.

Further, a similar provision is found in the agreement of the 28th June, 1889, clauses 1 and 2, which applied to the line then built, thus rendering the words in clause 7, sub-clause 1, unnecessary except as to the extension. Sub-clause 3 of clause 7 of the 1894 agreement gives the right to construct, etc., such switches and turn-outs as may from time to time be found to be necessary for the operating of the company's line of railway on Yonge street.

"Switches and turn-outs" do not include what is here proposed. The word "turn-out" has been considered by the Judicial Committee in a case between the appellant and the Toronto Railway Company (unreported, 2nd August, 1901), as meaning, in the agreement in which it was used, "a side-track on which a train can be shifted in order to let another train on the main track pass it." "Turn-out" was defined in *Bridgewater Borough v. Beaver Valley Traction Co.* (1906), 214 Pa. St. 343 (Supreme Court), as being a short line of track having connection by means of switches with the main track. In Tennessee, the Circuit Court of Appeals, in *City of Memphis v. St. Louis and S.F.R. Co.* (1910), 183 Fed. Repr. 529, expressed the opinion that the phrases "turn-outs" and "switches" related to tracks adjacent to and used in connection with another line of track, and not to one which branched off entirely from the existing line. These definitions are aided by the use of the words "side-tracks and turn-outs" in sec. 8 of the Act of incorporation.

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Nor does the order appealed from authorise any switches and turn-outs (even if these terms covered the deviation across the sidewalk on Yonge street) which lead to any cross-street, nor for the purpose of leading to any track allowances or rights of way on lands adjacent to Yonge street where the company's line deflects from Yonge street; for these expressions include only such deviations as are necessary along the company's line where it leaves the highway and returns to it again as part of its right of way, and not to such a deviation as is proposed here, which is not for the purpose of leading to any "cross-street, track allowance, or right of way."

The further provisions of sub-clause 3 of clause 7 are limited to deflection to the company's power-houses and car-sheds, which are not in terms or in fact covered by the order in appeal. It is not seriously contended that the respondent intends to connect with car-sheds. Clause 11 gives the right to operate the line across and along private properties only after a right of way has been expropriated, and this relates to such deflections as I have mentioned.

But, however these sub-clauses and clause 11 of the agreement are viewed, they must, if effective in the way contended, include such a deviation as was declared improper by the judgment of the Privy Council in 1913 (25 O.W.R. 315). Besides, both sub-clause 3 and clause 11 speak of tracks leading to track allowances or rights of way, and operation across and along private property after the rights of way have been expropriated: expressions entirely contrary to what is now proposed, i.e., merely deflecting the line to connect immediately with terminals and for the accommodation of its passengers, freight and cars.

The carriage of freight was urged as a reason why this deflection was necessary. It may be observed that by its Act of incorporation the right to carry freight is limited to the line outside the limits of the city of Toronto, and the provisions of 56 Vict. ch. 94, sec. 6, must be treated as subordinate to that provision.

As I understand the judgment of Falconbridge, C.J.K.B.—then Falconbridge, J.—in 31 O.R. 367, he held that the provi-

sion in the Act of incorporation as to the clauses of the Railway Act relative to "powers," "plans and surveys," and "lands and their valuation," applied to the respondent only so far as regards the portion of the railway outside the limits of the city of Toronto, and to the condition of affairs as it existed when the respondent sought to exercise those powers. In that view the Privy Council must have agreed in 1913, because the portion of Yonge street in question there was outside the limits as they existed in 1877, and, if applicable, the powers in the Railway Act would have justified what was then refused. I accept it as the correct view of the statute (see also *Collier v. Worth* (1876), 1 Ex. D. 464), and in consequence have not been able to regard the C.S.C. ch. 66 as in any way applicable here.

It seems strange that, when providing for the carriage of passengers and freight, the necessity now urged was not sufficiently obvious to require express provision for handling it on property adjacent to Yonge street and connecting that property with the rails thereon. It may be observed that in the statute enabling the respondent to acquire parks (56 Vict. ch. 94, sec. 8) no provision exists for running the tracks into these pleasure-grounds. There is no real reason why passengers should not board and alight from the cars on the streets, as they do elsewhere in the city of Toronto, where many more passengers are daily carried, and find accommodation in a station across the sidewalk, if the respondent really desires to accommodate them.

Upon the whole, there is ground for the opinion that these omissions were designedly made, especially in view of the fact that, where connections were required with power-houses and car-sheds, they were set out in express words in the Act or in the agreements. There is no trace of any willingness anywhere to grant the right to deflect except for very limited and specific purposes. The necessity for extreme caution with regard to the franchise claimed by this company before the Privy Council may have been foreseen and thus provided for.

No doubt, modern experience indicates that increased efficiency and decreased cost can be attained by the expenditure of money in facilitating the operations of a railway. But these

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considerations are not sufficient in themselves to warrant an extension of the words used in the statute or agreements beyond their plain meaning. Nor are they really applicable in a case where a railway was originally planned with horses as a motive power and with the idea that the highway was the cheapest and most convenient right of way, both for running and for operating all its functions. With a franchise expiring in 21 years, any large amount of money to be spent on terminals and for the comfort of passengers can hardly have been expected, and the language used was, no doubt, appropriate to the existing conditions. If, in 1894, where a 35-year franchise was being granted, there had been a change in the point of view, it might have been expected that what is now pressed for would have been provided for if an intention to do so existed.

There is not in what took place before the Ontario Railway and Municipal Board any comparison instituted between the way in which the passengers who come and go over the respondent's railway are handled by the Toronto Railway Company upon Yonge street, some few blocks below, nor how far freight could be dealt with at the car-sheds a couple of streets above. It is doubtful whether this Court has much to do with that as an element of fact; but, speaking for myself, I would have preferred it, if the question of inconvenience had been more clearly dealt with before the Board.

I have gone over the subsequent and present legislation cited upon the argument, and I am unable to come to the conclusion that anything that appears therein enabled the Board to deal with the subject unaffected by the terms of the agreements already recited or that the various sections relied on operate to give larger rights than the Act of incorporation did, i.e., subject to and upon the terms of the agreements. Indeed, sec. 229 of the present Ontario Railway Act recognises this in terms.

My conclusions may be summarised thus:—

1. The Act of 1877, 40 Vict. ch. 84, does not incorporate the sections of the C.S.C. ch. 66, relied on by the Board, so as to enable the powers therein given to be now exercised except outside the (present) limits of the city of Toronto.

2. That those limits are the limits existing when any appli-

cation is made which has to rely, for the right to exercise the desired powers, on the sections referred to.

3. That the rights of the respondent are to be put in force only under and subject to the agreements which it from time to time makes with the municipalities concerned, and that the agreements define the rights with which the respondent is clothed, in the absence of express legislation.

4. That the municipalities concerned are those which have jurisdiction over the streets and highways in question when an agreement is actually made.

5. That the County of York had, on the date when the 1894 agreement became effective, i.e., on the 25th October, 1896, lost jurisdiction over that portion of Yonge street in question, and that the Township of York then possessed it.

6. That the Township of York is not shewn to have given any permission or agreement while it had such jurisdiction.

7. That that portion of Yonge street passed to the City of Toronto in 1908 unaffected by the provisions of the 1894 agreement.

8. That that agreement, even if it bound the City of Toronto, does not comprehend such a deflection as is allowed here, under any of its terms nor under any that ought to be implied.

9. That the Board had no power or authority, either under any agreement already made, or under any statute, to make the order appealed from, giving the right to connect with terminals or with tracks and buildings on the lot in question for the accommodation of passengers and freight.

I think the appeal should be allowed with costs, and the order vacated.

Since the hearing of this appeal, the Court has had the advantage of a further argument on the effect of the documents recently produced. It has not in any way altered my view. Nothing that was then presented convinces me that the County of York had not, before the second agreement of 1896 became effective, and before the validating statute, lost its jurisdiction over that part of Yonge street annexed in 1908. The statute declares the agreements to be binding on the parties thereto,

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and does not purport to affect the rights of the Township of York.

KELLY, J.:—By 40 Vict. ch. 84, the Metropolitan Railway Company of Toronto was incorporated with power to construct, maintain, complete, and operate a double or single track iron railway, with the necessary side-tracks and turn-outs upon and along such streets and highways and railway tracks or lines within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities, as the company might be authorised to pass along, under and subject to any agreement thereafter to be made between the city and these municipalities or railway company and the said company, as to construction, maintenance, and repair of roadway, etc., and under and subject to any by-laws of the corporations of the said city and municipalities respectively, or any of them, made in pursuance thereof.

This Act also authorised the councils of the city and of the said municipalities, or any of them, and the company, to enter into agreements relating to the construction of the railway, and for several purposes, including the location of the railway, and the particular streets along which the same should be laid; and it provided that the powers contained in it (the Act) should remain in abeyance until such agreements should be entered into (sec. 17).

The name of the company has more than once been changed by statute, and the respondent, so far as is material to the present inquiry, may be considered the successor of the company so incorporated.

On the 25th June, 1884, an agreement was entered into between the Municipal Council of the County of York and the railway company permitting the company, on terms therein set out, to construct and operate a street rail track or tramway, with the necessary culverts, switches, and turn-outs (such switches and turn-outs being limited to four in number) in, upon, and along that portion of Yonge street lying between the northern limit of the city of Toronto and the town-hall at Eglington, in the township of York, that part of Yonge street being

then owned by the county. Clause 5 of the agreement is: "The location of the line of railway in the said street or highway shall not be made until the plans thereof shewing the positions of the rails and other works on said street shall have been submitted to and approved of by the warden, county commissioners, and engineer."

By clause 16, the privileges and franchises granted were made to extend for 21 years from the 25th June, 1884; and by an agreement of the 28th January, 1886, these privileges and franchises were further extended so as to run for 31 years from the 25th June, 1884. Both of these agreements, and others as well, were, by 56 Vict. (1893) ch. 94, confirmed and declared binding on the parties to them. All these agreements are set out in full in schedule A. to that Act.

The company's application to the Ontario Railway and Municipal Board, from whose order the present appeal is taken, was for approval of its plans for "switches or deviations from Yonge street into the company's property south of Farnham avenue" on the west side of Yonge street.

In 1888 the city's limits were extended northerly to a line a short distance to the south of Farnham avenue, and in 1908 the limits were still further extended northerly, this latter extension taking in the land into which the respondent now seeks to construct "switches or deviations."

In 1896, the county parted with its title to the part of Yonge street now under consideration, and the city, when its limits were extended in 1908, acquired it.

Clause 5 (quoted above) in my opinion imposes an obstacle to the right of the company to succeed on the application. Keeping in mind that the powers and rights of the company, a creature of statute, to build upon or over and to use the highways, are not inherent, but are only such as are conferred by statute or by agreements authorised by statute, the fulfilment of the conditions imposed upon it is an essential to locating its line of railway in or upon the street or highway. Unless, therefore, there can be found other agreements, acts or happenings, expressly or in effect relieving the company from the obligation so imposed upon it, of submitting plans and obtaining the

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approval referred to, it is still bound thereby. I have searched without result in subsequent legislation and agreements for an expression of authority to the company to proceed unless in compliance with these conditions. These imperative requirements are still in force.

The respondent relies on these later agreements, particularly that of the 6th April, 1894, for authority for the course it has taken. These agreements dealt largely with extension of the railway still further to the north, that of the 6th April, 1894, between the county and the company, in clause 7 (3) providing for the construction, putting in, and maintenance of "such culverts, switches, and turn-outs as may from time to time be found to be necessary for the operating of the company's line of railway on Yonge street, or leading to any of the cross-streets leading into or from Yonge street, or for the purpose of leading to any track allowance or rights of way on lands adjacent to Yonge street, where the company's line deflects from Yonge street, or to the company's power-houses and car-sheds;" and clause 11 being: "The company may deflect its line from Yonge street and operate the same across and along private properties after expropriating the necessary rights of way under the provisions of the statutes in that behalf."

There is no express repeal of or interference with the terms of clause 5 above cited; but in the legislation of 1897 (60 Vict. ch. 92), by which the agreement of the 6th April, 1894, and another agreement between the same parties of the 7th February, 1896, were validated, there is an indication of intention not to disturb the rights of the company in the territory now in question, where (by sec. 6) it is provided that, in the event of the city extending its limits so as to include any portion of the right of way, such extension of the limits shall not affect the rights of the company at the date of such extension or its property then situate within such extended limits, and that the powers conferred by that Act on the company shall remain as if the said limits had not been extended.

I entertain grave doubts of the company having acquired the right to "deflect" its line from Yonge street in the manner

and for the purposes now intended; as to that, however, I do not desire to be taken as expressing an opinion intended to be binding. But, assuming such right to exist, I am clearly of opinion that it cannot be exercised unless by compliance with the conditions imposed by clause 5 of the agreement of the 25th June, 1884; a course which it has not followed, there being nothing in the material before us to shew that plans were so submitted or approval obtained.

The appeal should be allowed with costs.

Appeal allowed with costs.

[APPELLATE DIVISION.]

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Libel—Pleading—Defence—Admission—Justification—Failure to Prove Truth of Alleged Libel—Jury—Verdict—Improper Admission of Evidence—Power of Amendment—New Trial.

The defendant company printed and published in a newspaper a statement that the plaintiff had been fined and suspended from association race-tracks for assaulting C., the starter at a race-meeting. The plaintiff brought an action for libel. The innuendo was, that the plaintiff had been guilty of an unlawful assault and of an indictable offence and of improper conduct as a horseman. The important defence was: "In so far as the said words consist of allegations of fact, they are true in substance and in fact, save that the plaintiff did not assault C., but was fined by him for irregularities on the race-track." The evidence at the trial shewed that the assault was not committed by the plaintiff, but by another person, and that in fact the fine was intended to be imposed upon another. It was recorded, however, against the plaintiff, and remained against him until removed, on the facts becoming known. The trial Judge ruled that the newspaper statement did not in fact allege that the plaintiff had assaulted C., but did allege that the plaintiff was fined for assault, and the defence quoted was treated as an ordinary plea of justification. There was a verdict for the defendant:—

Held, that the defence, if treated as one of justification simply, was disproved when it was shewn that C. intended to fine some one other than the plaintiff, notwithstanding that he recorded the fine against him. If dealt with as its language required, it was an admission to the same effect. The jury having found for the defendant, in face of an admission and against evidence that the newspaper statement was untrue as to one part—a part clearly libellous in the circumstances—the verdict could not stand.

Lumsden v. Spectator Printing Co. (1913), 29 O.L.R. 293, followed.

Held, also, that evidence was improperly admitted of a previous fine imposed during the day for irregularities on the track, which fine was withdrawn.

Held, also, that the pleadings in an action for libel must define the issue which is being tried. The defendant upon a plea of justification is

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limited to proving the truth of his assertion, and ought not to be allowed, to the prejudice of the plaintiff, to adduce evidence which may raise a totally different issue. Confusion will arise, and a mistrial may be caused, if evidence is admitted upon the theory that the pleadings do not bind the parties, because of the power to amend.
 A new trial was ordered.

APPEAL by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial at London, dismissing an action for libel, upon the verdict of a jury.

November 25. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Robertson and *R. S. Hays*, for the appellant, argued that evidence had been improperly admitted of a fine of \$25 which had been imposed on the plaintiff for irregularities on the race-track. But, aside from that, the jury could not have rightly found for the defendant company, considering the admission made that the allegations were untrue in part. The part admitted to be untrue was certainly libellous: *Roberts v. Camden* (1807), 9 East 93; *Beavor v. Hides* (1766), 2 Wils. 300; *Lumsden v. Spectator Printing Co.* (1913), 29 O.L.R. 293. Proof of justification must be strict, and the defendant company should have been confined to proving the truth of its words: *Odgers on Libel and Slander*, 5th ed., pp. 181, 191, 638, 695. Here the plea of justification was nullified by the admission of falsity as to part of the assertions contained therein: *Fisher v. Keane* (1878), 11 Ch.D. 353; *Shepherd v. Whitaker* (1875), L.R. 10 C.P. 502.

J. M. McEvoy, for the defendant company, respondent, contended that the verdict and judgment were right. The plea was one of justification in part. The part admitted to be untrue was not libellous. After all, the important question was the truth or falsity of the allegations, and the defendant company justified only the true ones. He referred to *Hope v. I'Anson and Weatherby* (1901), 18 Times L.R. 201; *Muma v. Harmer* (1859), 17 U.C.R. 293.

Robertson, in reply.

December 9. The judgment of the Court was delivered by HODGINS, J.A.:—The jury have found a verdict for the re-

spondent. The libel charged was as follows: "Horseman fined for assault on Race Starter. Wm. Cudmore and Wm. Govenlock also suspended from track at Seaforth. Mitchell, May 24. William Cudmore and William Govenlock, of Seaforth, were fined \$100, and both suspended from any association track by Mitchell Sporting Association this afternoon for assaulting the starter at the Victoria Day Races, Mr. N. H. Conley, of Toronto. Their horses, Patron Dillard and Ritchie, were also suspended." The innuendo was: "Meaning thereby that the plaintiff had been guilty of an unlawful assault and guilty of an indictable offence and of improper conduct as a horseman."

The important plea is No. 3, which is expressed thus: "In so far as the said words consist of allegations of fact, they are true in substance and in fact, save that the plaintiff did not assault Mr. N. H. Conley, but was fined by him for irregularities on the race-track."

If this means anything, it is a plea of justification of the libel as set out, except as to that part which indicates, if in fact it indicates anything of the sort, that the cause of the fine was an assault by the appellant on the starter and that the latter fined him for it. This plea is a peculiar one, but it was treated as an ordinary plea of justification, the learned trial Judge having ruled that the libel did not in fact allege that the appellant had assaulted the starter, but did allege that he was fined for assault. It was, no doubt, intended as a plea of justification as to part only, but it fails in not specifying the precise matters justified. It, however, is an admission to the benefit of which the appellant is fully entitled.

The ruling alluded to, given in the charge to the jury, seems to me to leave out of account the admission in the plea that the statement that the appellant was fined for assault was not true, but that what he was fined for was "irregularities on the race-track"—quite a different thing.

The evidence shewed that the assault was committed, not by the appellant, but by Cudmore, and that in fact the fine was intended to be imposed upon Cudmore and another person present when the assault took place. This was not the appellant,

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but his brother. It was recorded, however, as against the appellant, and in fact remained against him until it was removed in Chicago, on the facts which I have stated becoming known.

The plea, if treated as one of justification simply, was disproved when it was shewn that the starter intended to fine some one other than the appellant, notwithstanding that he recorded the fine against him. If dealt with as its language requires, it is an admission to the same effect. Fining may and probably does include both the imposition by word of mouth, the adjudication in fact, and its record, but the mere recording against one individual of a fine intended for and pronounced against another, is not sufficient to establish it, if it had no real existence in intention.

The learned Judge's charge contains the following: "It is said that he was fined for assault. Isn't that true? Was he fined? Conley said that he was, and Martin has said that he was. Has any one said that he was not? . . . Are you able to find in it anything that is untrue?"

Conley in his examination said, in answer to questions from the trial Judge, as follows: "Q. Well, now, what did you fine them and suspend them for? A. I fined them and suspended Cudmore for striking me in the face, and I thought they were together. I saw a man standing there with him which I took for Govenlock."

The learned Judge accepted the evidence given that the appellant was not present when the assault took place and the fine was imposed. The jury have found for the respondent, in face of an admission and against evidence that the libel is untrue as to one part—clearly libellous under the circumstances—and the verdict cannot stand: *Lumsden v. Spectator Printing Co.*, 29 O.L.R. 293.

Evidence was admitted, I think improperly, of a previous fine of \$25 imposed during the day for irregularities on the track, which fine was withdrawn; a fact that was clearly irrelevant, having regard to the explicit terms of the article published. It was calculated to suggest to the jury that, although the fine of \$100 might have been improperly imposed, yet, having regard

to the ruling quoted, i.e., that the libel did not charge an assault by the appellant, he was fined, and properly fined, for other things, and that the article was justified in stating that he was fined, when this explanation was given.

There is one remark made by the learned trial Judge from which I must respectfully dissent. That is, that the plea—i.e., the third plea—if inaccurate, did not bind the parties, and that they could amend the pleadings as they pleased. The pleadings in a libel action must define the issue which is being tried. Justification means one thing, and one thing only: i.e., that the libel is true as printed. If the parties can shift their ground during the trial, and evidence can be given, not under the limitations imposed by such a plea, upon the theory that the pleadings do not bind the parties, utter confusion may be caused and a general verdict one way or the other may mean a mistrial. Examples of this may be found in many cases. See *Brown v. Moyer* (1893), 20 A.R. 509; *Manitoba Free Press Co. v. Martin* (1892), 21 S.C.R. 518; *Jackes v. Mail Printing Co.* (1915), 7 O.W.N. 677.

The defendant upon such a plea is limited to proving the truth of his assertion, and ought not be allowed, to the prejudice of the plaintiff, to adduce evidence which may raise a totally different issue. The right to amend is one thing, but the binding effect of an admission or a plea in a libel action should not be frittered away.

I think the judgment in appeal should be vacated and a new trial ordered. The respondent should pay the costs of the appeal, and the costs of the former trial should be dealt with by the Judge presiding at the new trial.

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BALL V. WABASH R.R. Co.

Trial—Findings of Jury—Negligence—Contributory Negligence—Injury to Servant of Railway Company—Conflicting Findings—New Trial—Rule 501 (1).

In an action for damages for injuries sustained by a locomotive fireman employed by the defendants, by reason of the escape of steam from a valve in the locomotive engine, the jury found, in answer to questions: (1) that the injuries of the plaintiff were caused by the negligence of the defendants; (2) that such negligence consisted in not seeing that the valve was properly closed; (3) in answer to the question "*Or were the plaintiff's injuries the result of his own negligence?*"—"No;" (5) that the plaintiff, by the exercise of reasonable care, could have avoided the accident; (6) that he could have done so "*by examining valve.*"—*Held*, that there was evidence proper to be submitted to the jury on all branches of the case; and (RIDDELL, J., dissenting) that the answers of the jury were conflicting, and there should be a new trial: Rule 501 (1).

Per RIDDELL, J.:—The reading of the answers most favourable to the plaintiff would be: "We find that this accident was caused by the negligence of the defendants, and it could have been avoided by the plaintiff exercising reasonable care—but we do not call the omission to use that reasonable care, negligence on the part of the plaintiff." On the answers, the action should be dismissed.

ACTION for damages for injuries sustained by the plaintiff, a locomotive fireman employed by the defendants, by reason of their negligence in relation to the escape of steam from a valve.

The action was tried before SUTHERLAND, J., and a jury, and questions were submitted to the jury, which, with their answers, were as follows:—

(1) Were the injuries of the plaintiff caused by the negligence of the defendants? A. Yes.

(2) If so, wherein did such negligence consist? A. In not seeing that the valve was properly closed.

(3) Or were the plaintiff's injuries the result of his own negligence? A. No.

(4) If so, wherein did such negligence consist? (Not answered.)

(5) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

(6) If so, what could he have done? A. By examining valve.

The damages were assessed at \$2,200.

A. A. Ingram, for the plaintiff.

H. E. Rose, K.C., for the defendants.

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June 25. SUTHERLAND, J.:—This is an action in which the plaintiff, a fireman employed by the defendant company, alleges that he opened the injector on an engine of the defendant company to let water into the boiler, and then began to clean up the floor of the cab and deck of the engine, and, while doing so, moved a heavy shaker-bar and also a hopper-key, which were resting against the squirt-hose attached to the boiler of the engine. He says that, as soon as he did so, the nozzle of the said squirt-hose, which up to that time had been held down through a hole in the floor of the cab by the weight of the shaker-bar and key, flew up, by reason of the pressure of steam and hot water from the boiler, and a stream of scalding water therefrom struck him in the face and completely destroyed the sight of his right eye and severely scalded his face. He asserted that the injuries were caused by the negligence of the defendant company or its servants or agents.

At the trial, the jury found, in answer to questions, that the injuries of the plaintiff were caused by the negligence of the defendant company, and that such negligence consisted in not seeing that the valve was properly closed. They also, in answer to a question whether the plaintiff's injuries were the result of his own negligence, found that they were not; but, in reply to certain further questions, that, by the exercise of reasonable care, the plaintiff might have avoided the accident, and that what he could have done was to have examined the valve before attempting to use the hose.

The answers of the jury with reference to the plaintiff's conduct are, it seems to me, conflicting and such as to make it difficult, if not impossible, to enter a verdict thereon, in spite of the finding of negligence against the defendant company.

Upon consideration thereof, I am of opinion that it is a case for the application of Rule 501(1), which is in part as follows: " . . . where the answers are conflicting so that judgment cannot be entered upon such findings, the action shall be re-tried as in the case of a disagreement."

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I therefore order a re-trial of the action; the costs to date to be in the cause.

The defendants appealed from the judgment of SUTHERLAND, J.

November 2. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. E. Rose, K.C., for the appellants, argued that there was no evidence of negligence of the defendants to go to the jury; that there had been no real finding of negligence on the part of the defendants; that the jury had found contributory negligence by the plaintiff; and that on the findings the defendants were entitled to judgment. He also urged that there should have been a nonsuit, as asked at the trial.

A. A. Ingram, for the plaintiff, respondent, contended that the plaintiff should have a verdict on the evidence. It was not the duty of the plaintiff to inspect the valve before starting his engine. He took it for granted that the valve was closed, as he had left it on the last occasion previously when he had used it. The jury had found that the plaintiff's injuries had been caused by the negligence of the defendants. The jury did not mean by their answers to the fifth and sixth questions that there was any duty cast upon the plaintiff to examine the valve. In any event, if the plaintiff should not be given the verdict, the judgment below should stand, and a new trial be had, for the reasons given by the learned trial Judge.

Rose, in reply.

December 9. FALCONBRIDGE, C.J.K.B.:—I am of the opinion that there was evidence proper to be submitted to the jury on all branches of the case.

The answers of the jury to the written questions are set out in the judgments of my learned brothers. They are, I think, plainly conflicting, and I agree with the learned trial Judge, who, in a considered judgment, held, that it was a case for the application of Rule 501(1), and directed a new trial.

The appeal ought, therefore, to be dismissed with costs.

LATCHFORD, J.:—The judgment in appeal directs, under Rule 501(1), a new trial, on the ground that the answers of the jury “are conflicting and such as to make it difficult, if not impossible, to enter a verdict thereon, in spite of the finding of negligence against the defendant company.”

The jury found that the injuries sustained by the plaintiff were not caused by his own negligence, and were caused by the defendants’ negligence, consisting in not seeing that the valve referred to in the pleadings and evidence was properly closed.

There was, I think, evidence to support each of these findings of fact. The case accordingly falls to be considered, not upon the two first grounds urged in the appeal—that there was no evidence of the defendants’ negligence to go to the jury and that there was no real finding upon the question of their negligence—but upon the findings made as affected by the answers of the jury to the questions: “(5) Could the plaintiff by the exercise of reasonable care have avoided the accident?” and “(6) If so, what could he have done?” To (5) they answered “Yes,” and to (6) “By examining the valve.”

There is what seems to me a contradiction in saying, as the jury said, that there was no negligence on the part of the plaintiff, but by exercising reasonable care in examining the valve, that is, by being not-negligent, he could have avoided the accident. His injuries are found to result from his want of reasonable care—in other words, from his negligence; and they are found not to result from his negligence.

In *St. Denis v. Baxter* (1887), 13 O.R. 41, an appeal from the judgment at the trial directing, upon inconsistent answers by the jury, that the action be dismissed, the Court equally divided as to the effect of the answers, and the appeal consequently failed. Mr. Justice Proudfoot thought the judgment should not be disturbed. Chancellor (now Sir John) Boyd considered that there should be a new trial, unless the defendants were content to let the verdict go to the plaintiff for \$100, as the jury recommended. This view was affirmed by the Court of Appeal (1888), 15 A.R. 387. Hagarty, C.J.O., while concurring in the opinion that there should be a new trial, held the dissenting view that neither party was entitled to judgment.

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I adopt the language of the learned Chancellor in the *St. Denis* case (13 O.R. at p. 44): "I cannot find any practice which justifies me in disregarding any material part of what the jury have returned to the presiding Judge." Here the jury, while finding the defendants negligent, found the plaintiff negligent and not-negligent. It is a case which, in my opinion, falls properly within the scope of the Rule referred to by the learned trial Judge.

A case that might at first sight appear to render the rule inapplicable is *Kerry v. England*, [1898] A.C. 742, where a refusal to grant a new trial was held to be proper; but there the answers were not inconsistent. Here they plainly are.

In *Australasian Steam Navigation Co. v. Smith & Sons* (1889), 14 App. Cas. 321, it appeared that contradictory verdicts had been given on separate trials involving the same questions, and that the evidence was so fairly balanced that a jury might have found either way. Their Lordships decided that both cases should be tried again, not separately, but together.

Here the answers are as contradictory as if given by two juries trying the same issues.

In my opinion, judgment should be rendered dismissing the appeal with costs.

KELLY, J.:—This action is for damages resulting, it is alleged, from the defendants' negligence. At the trial questions were submitted. In answer to one of these, the jury found that the plaintiff's injuries were caused by such negligence. One reason given for the appeal is, that there was no evidence to support that finding. I think, however, that there was, and the appeal cannot succeed on that ground.

Whatever difficulty there is as to the result of the findings has arisen from the manner in which the jury answered the questions bearing upon the plaintiff's conduct in the matter. Their answer to question 3: "Or were the plaintiff's injuries the result of his own negligence?" was in the negative, while to question 5: "Could the plaintiff, by the exercise of reasonable care, have avoided the accident?" they answered "Yes." They answered

the next question: "If so, what could he have done?" thus: "By examining valve."

These findings the learned trial Judge concluded were so conflicting as to make it proper to apply Rule 501(1), and he therefore directed a new trial, as in the case of a disagreement.

Standing by itself, the meaning of the answer to each of these two questions (3 and 5) is clear, and viewed in that way they are contradictory; for, taking the answer to question 5, as it must be taken, as meaning that the plaintiff was negligent, we have one finding that he was negligent and the other that he was not negligent.

But importance is sought to be given to the introduction of the word "or" at the beginning of question 3, as indicating that that question and question 1 were intended to be in the alternative, and that the jury having found in answer to the earlier question that the defendants were negligent, they felt bound by the connection thus made between the two questions to answer the third as they did answer it, notwithstanding what they had in mind as the proper answers to questions 5 and 6; and therefore that the real meaning of their answers, considered together, is, that the plaintiff, by the exercise of reasonable care, could have avoided the accident, thus rendering him liable for such contributory negligence as disentitled him to judgment.

Unless by disregarding some material part of the findings, I cannot so interpret the meaning of these answers. The answers are conflicting and the meaning the jury intended to convey doubtful. Neither party is entitled to judgment on the findings.

The course adopted by the learned Judge was, under the circumstances, a proper one, and I think the appeal should be dismissed with costs.

RIDDELL, J.:—In the locomotive engines of the Wabash Railroad Company, as in most engines of a modern type, there is an "injector," whose function is to force water into the boiler through a pipe against the pressure of the steam within—by reason of its connection with the boiler and the effect of the steam in the injector, the water in this pipe is always hot. Between

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the injector and the boiler, the pipe is tapped for a "squirt-hose," which is a short flexible tube, $3\frac{1}{2}$ feet long, by which water may be obtained under pressure for wetting the coal, etc.—unless water is being obtained, this hose is of course empty, and its "screw-valve" closed—when the screw-valve is open, the hot water is forced out with considerable force if the injector is in operation—if the injector is itself cut off, opening the screw valve of the squirt-hose is ineffective, and no water comes out.

The plaintiff was a fireman in the employ of the Wabash company, who left his engine, No. 1876, on the 26th August, at about 11.45 p.m., at St. Thomas—the screw-valve was, he says, at that time closed (p. 12), he having last used the squirt-hose some five miles back. On the 28th August, he was again called on duty about noon; the engine was in the round-house, and the "light-up man" putting fire in her when the plaintiff reported—he looked her over to see if any supplies were needed, looked into the fire, etc., etc., and went away. Then the "hostler staff" took the engine out of the round-house to the water-tank and turned her over to the train-crew. The plaintiff mounted the cab, turned on the injector (p. 9), and the squirt-hose, which so far had been lying quietly on the floor, was thrown upward by the force of the steam, hot water was "squirted" into the plaintiff's face, and he was seriously injured.

He brought an action, alleging negligence on the part of the company, and improper construction and condition of the screw-valve, of the squirt-hose, etc., etc.

At the trial he confined his claim to paragraph 8: "The plaintiff further says that the said injuries were caused by the negligence of some person in the service of the defendants having charge of said engine No. 1876 upon the defendants' railway, and such negligence consisted in such leaving open the said valve without notice to or the knowledge of the plaintiff."

The case was tried at St. Thomas before Mr. Justice Sutherland and a jury, on the 24th March, 1915: questions were submitted, which, with the answers thereto, are as follows:—

(1) Were the injuries of the plaintiff caused by the negligence of the defendants? A. Yes.

(2) If so, wherein did such negligence consist? A. In not seeing that the valve was properly closed.

(3) Or where the plaintiff's injuries the result of his own negligence? A. No.

(4) If so, wherein did such negligence consist? (Not answered.)

(5) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

The sixth question, "(6) If so, what could he have done?" was not answered at first, but His Lordship directed the jury to retire and answer it also—they did so and gave the answer "By examining valve"—they assessed the damages at \$2,200.

My learned brother thought the answers conflicting and left the case for a new trial.

The defendants appeal (1) against the refusal of the motion for a nonsuit at the close (a) of the plaintiff's case and (b) of the whole case; and (2) in any event for judgment on the answers of the jury.

As at present advised, I am not disposed to accede to the motion on the first ground. The plaintiff had, he swore, left the "screw-valve" closed—the engine then got into the hands of the hostler—in the usual course—"it is taken over by the hostler; he takes charge of the engine and looks after it, he cares for it and sees there is water in the boiler, and keeps steam up till he gets a chance to get it in the round-house: . . . he takes it down to the cinder-pit, and perhaps coals it, if necessary, takes it down to the cinder-pit, dumps the fire, and takes the engine to the round-house . . . ; the practice is to run it down to the cinder-pit and dump it, and for the hostler to inject the water in the boiler and keep the water up." There was "occasion on this night of the 26th that would affect the frequency with which water would have to be injected into that boiler. . . . The engine was leaking, she had a bad leak at the door, and she was also leaking in the front end by the flue-sheet, the water at the front end. . . . It would require an extra amount of water put in the boiler, perhaps using the injector far more frequently." And the practice is "having it as full as possible,

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the boiler as full of water as possible, full." Then "the squirt-hose valve is used on occasions very often to relieve the pressure in the injector and to get the injector to work."

So far the plaintiff, who also says "it," i.e., the screw-valve, "is out of its proper position when it is not closed, when it is not wanting to be used."

Had the defendants not called evidence, the case would not have been strong, but they did call evidence, and the motion for nonsuit must depend on all the evidence, not that of the plaintiff and his witnesses alone. The defendants called the locomotive foreman, and he swore that "the proper position for that valve is closed" (p. 47); and the inspector, who swore that he would not send "out an engine with the valve of the squirt-hose open" (p. 62); and the proper position for the valve, when not in use, is "shut, certainly" (*ib.*)

On that evidence, a jury would be justified in finding: (1) that the plaintiff left the valve closed; (2) notwithstanding their denial, that the hostlers had opened it; and (3) left it open, which (4) was not proper.

As at present advised, I do not think that the hostlers were persons who have "the charge or control of any . . . locomotive . . . upon a railway . . ." under the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3(e)—that sub-section rather having reference to the operation of the railway. Nor do I think that there was any defect in the engine. But a jury would be amply justified in finding a defect in its condition under sec. 3(a).

We have held in *Story v. Stratford Mill Building Co.* (1913), 30 O.L.R. 271 (compelled thereto, as we thought, by *Markle v. Donaldson* (1904), 7 O.L.R. 376, 8 O.L.R. 682), that it is not necessary for the jury to find who the negligent person is, whose negligence will hold the master liable under sec. 4(c) of the Act. It is quite idle for the locomotive foreman to say as he does (p. 43) that neither he nor "the company has delegated to anybody the duty of seeing that any particular valve is in any particular position at the time that the engine is delivered over to the crew that is going to take it on the road"—it is plain that the company did delegate to the hostlers the duty of seeing that the con-

dition of the engine was proper when it was turned over to the crew.

The jury, therefore, is perfectly justified in finding negligence for which the defendants are liable, although they do not lay their finger upon the negligent man. It is true they do not find negligence in opening the valve or leaving it open, but in not seeing that it was closed—but the same man who left it open should have seen it closed.

It remains to dispose of the case on the answers of the jury.

It is probable that the difficulty has arisen from what (with much respect) I think an objectionable form given to the questions. The first and third questions are put as alternatives—and it might very well be that the jury believed they were tied down to one of these—that if they answered the first question in the affirmative they must answer the third (if at all) in the negative. I have read with care the charge, and it seems to me that such a view could not well be avoided.

My learned brother begins his charge: “In this action, gentlemen of the jury, the plaintiff is charging the defendant company with negligence occasioning or contributing to the injury sustained by him resulting in the loss of his right eye and the burning of his face to some extent. The specific allegation of negligence, which is really the only one now left for you to consider or pass upon, is set out in two paragraphs of the statement of claim. . . .”

Then, when the questions are put, he says: “I will ask you to consider these questions: ‘Were the injuries of the plaintiff caused by the negligence of the defendant?’ If so, if you answer that ‘yes’—if you answer it ‘no,’ the action is practically done, and it is not necessary to answer any other question; if the plaintiff has not proved that the defendant was guilty of any negligence, he cannot succeed in the action—but, if you answer that question ‘yes,’ if so, wherein did such negligence consist? The negligence charged is, and the only negligence that you are dealing with is this, that the negligence of the defendant consisted in the fact that some one in charge of this engine had negligently left open this valve, and the injuries resulted in con-

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sequence of that. Then, on the other hand, the defendants say that there was a duty on the part of this plaintiff, that before opening the injector it was his duty, it was such a thing as a reasonable and careful man should do, to look and see that the squirt-hose valve was not open, and that if he had done that he would have discovered that it was open, and he could have foreseen the danger or the probable danger and might have avoided the accident. The plaintiff says, through his counsel, that he had a right to assume that it was not open, that the engine was turned over there ready for him to go on and do his work, and that he simply went on and attempted to do his work without having in mind at all that this might be open and that injury might result; so that I am asking you the question whether, in these circumstances, in your opinion, the plaintiff's injuries were the result of his own negligence, whether you come to the conclusion that he ought, with due regard to safety and freedom from negligence on his part, to have looked to see if this valve were open before he commenced the work upon the engine at this time. Then, if you come to that conclusion, the next question, 'If so, wherein did such negligence consist?' And you will have to set out what you think he ought to have done; if you think he should have done anything which he did not do, and which resulted in contributing to the injury; and then I have followed with another question, 'If so, what could he have done?' That is, what could he reasonably have done, which he did not do, to have avoided the accident, and but for the failure to do on his part the accident would not have occurred. When you have answered these questions, then if you have answered them in the way you seem to think makes the defendant liable, you will consider the question of damages and will add at the foot such sum as you think, having regard to the evidence, you can allow the plaintiff."

It seems to me that on that charge, and considering the questions that were put, the jury must have considered that the first and third questions were alternatives, so that an affirmative answer to the first necessitated a negative answer to the third—and that the fifth question was to be answered on its merits.

That the answers to the fifth and sixth questions are wholly justified by the evidence cannot be and has not been disputed—and these findings entitle the defendants to a judgment as a matter of law. And there is no possible ground for granting a new trial by a discretionary order—nor indeed is that asked.

The very highest the answers can be put in favour of the plaintiff is to read them as though the jury said: "We find that this accident was caused by the negligence of the defendants, and it could have been avoided by the plaintiff exercising reasonable care—but we do not call the omission to use that reasonable care, negligence on the part of the plaintiff."

I think the appeal should be allowed and the action dismissed, both with costs if asked.

Appeal dismissed; RIDDELL, J., dissenting.

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[APPELLATE DIVISION.]

REX v. WEST.

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Sept. 27.

Criminal Law—Obstructing Peace Officer—Criminal Code, sec. 169—Summary Conviction by Police Magistrate—Indictable Offence—Option of Crown—Procedure—Mode of Trial—Consent of Accused—Secs. 773(e) and 778 of Code.

The decision of MIDDLETON, J., 34 O.L.R. 368, was affirmed.
Regina v. Crossen (1899), 3 Can. Crim. Cas. 152, not followed.

APPEAL by the defendant from the order of MIDDLETON, J., 34 O.L.R. 368, made upon the return of a *habeas corpus* and *certiorari* in aid, refusing to discharge the defendant from custody, under a warrant of commitment issued pursuant to a conviction of the defendant by a Police Magistrate for wilfully obstructing a peace officer in the execution of his duty.

September 27. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Kilmer, K.C., for the appellant. The charge was under sec. 169 of the Criminal Code; the accused was not indicted; his trial by the magistrate was a summary trial under sec.

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773 (e) of the Code; the procedure prescribed by sec. 778 should have been followed, and the accused should have been asked to elect: *Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152; *Rex v. Carmichael* (1902), 7 Can. Crim. Cas. 167. The accused was afterwards charged under sec. 296 (b) before the County Court Judge upon an amended warrant. The learned Judge below refers to the case of a common assault; but sec. 732 of the Code prescribes precisely what the Justice is to do where he considers the assault charged a fit subject for indictment—he is to abstain from adjudication thereon. That really makes the case of this accused stronger.

J. R. Cartwright, K.C., and *E. Bayly*, K.C., for the Crown, were not called on.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of Middleton, J., dated the 9th September, 1915, refusing to quash the conviction of the appellant, under the summary conviction provisions of the Criminal Code, of an offence against sec. 169 of that enactment.

We are of opinion that the judgment of the learned Judge is right, and should be affirmed.

Section 169 provides that:—

“Every one who resists or wilfully obstructs,—

“(a) any peace officer in the execution of his duty or any person acting in aid of such officer;

“(b) any person . . .

“is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years’ imprisonment, and, on summary conviction before two Justices, to six months’ imprisonment with hard labour, or to a fine of one hundred dollars.”

It is clear that the section provides for alternative methods of procedure, i.e., by indictment or under the summary conviction provisions of the Code, and the prosecutor has the option as to the mode of prosecution.

The scheme of the Code is clear.

Part XIV. is headed “Procedure on Appearance of Accused

before Justice," and deals with the case of persons accused of indictable offences; according to its provisions, the preliminary inquiry provided for results either in the discharge of the accused or his committal for trial.

Part XVI. is headed "Summary Trial of Indictable Offences;" and, according to its provisions, the Justice may, instead of committing for trial or proceeding in the manner directed by Part XIV., try summarily in the case of certain indictable offences. In these cases there is no jurisdiction to try summarily unless with the consent of the accused, except in certain enumerated cases, to which it is not necessary to refer.

Part XV. deals with summary convictions, and applies, among other cases, to "every case in which any person commits, or is suspected of having committed, any offence or act over which the Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment" (sec. 706, clause (a)). The cases to which this Part applies are withdrawn from the operation of Parts XIV. and XVI., and a complete code of procedure is laid down in it for the cases coming within its provisions. The only excepted cases are those mentioned in secs. 709 and 732, the effect of which is to withdraw from the jurisdiction of the Justice certain cases of assault which, but for these sections, there would be authority to try summarily under Part XV.

Counsel for the appellant relied in support of the appeal upon a decision of the Court of Queen's Bench of Manitoba in *Regina v. Crossen*, 3 Can. Crim. Cas. 152. The report of the case is very meagre, and all that is said is, that the Court directed that the writ of *certiorari* should be granted on the ground that "the offence charged comes within section 783, sub-section (e)" (now section 773 (e)) "of the Criminal Code, and subsequent sections, and that the parties could not have been tried summarily except after compliance with section 786" (now 778) "of the Code, notwithstanding the provisions of section 144" (now sec. 169).

With great respect, we are unable to agree with that conclusion. The result of the decision would be that in every case

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where the charge is the commission of an indictable offence the provisions of Part XVI. would be applicable and must be followed, and the effect of this would be to read out of sec. 169 the provision that a person accused of an offence under it may be punished on summary conviction.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

Dec. 10.

LAVERE v. SMITH'S FALLS PUBLIC HOSPITAL.

Negligence—Injury to Patient in Hospital—Carelessness of Nurse—Public Charitable Institution—Corporate Body—Liability—Contract to Nurse Patient—Master and Servant—Servant not under Orders of Surgeon—Respondeat Superior—Damages.

The judgment of BRITTON, J., 34 O.L.R. 216, was reversed, and it was held, that, as the defendants' express contract with the plaintiff was, *inter alia*, to nurse her, they were responsible as in contract for the negligence of the nurse in attendance upon the plaintiff whereby the plaintiff was injured—*respondeat superior*—since what the nurse did was in the course of her routine of duty as the servant of the defendants, and was not done under the orders of the surgeons who had operated upon the plaintiff.

Review of the authorities.

Hall v. Lees, [1904] 2 K.B. 602, *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, and *Glavin v. Rhode Island Hospital* (1879), 34 Am. Reps. 675, 12 R.I. 411, specially referred to.

The "trust fund theory," under which the funds of such a hospital as the defendants' were considered exempt from liability for damages, has no longer any footing in the law of England or Ontario.

Mersey Docks Trustees v. Gibbs (1866), L.R. 1 H.L. 93, followed.

The plaintiff's damages were assessed by the appellate Court at \$900.

APPEAL by the plaintiff from the judgment of BRITTON, J., 34 O.L.R. 216.

November 15. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

J. A. Hutcheson, K.C., for the appellant. The contract between the parties must determine the liability. The defendants here contracted to nurse the plaintiff, not merely to supply a nurse, and the damages which the plaintiff sustained resulted from the negligence of a person employed by the defendants to do the nursing. The maxim *respondeat superior* applies: *Hall*

v. *Smith* (1824), 2 Bing. 156. The learned Judge misapprehended the evidence when he found the nurse not to be the servant of the defendants. This is not a case like *Hall v. Lees*, [1904] 2 K.B. 602, where the defendants only contracted to supply a nurse. Nor is it like *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, where the nurses in the operating room were under the direction of the surgeons. Here the nurse was engaged in her ordinary work, and therefore was the servant of the defendants: *Foote v. Directors of Greenock Hospital*, [1912] Sess. Cas. 69, at p. 75.

[RIDDELL, J., referred to *Tucker v. Mobile Infirmary Association* (1915), 68 Sou. Repr. 4.]

G. H. Watson, K.C., for the defendants, respondents. The relationship of master and servant did not exist here between the defendants and the nurse who made the mistake: *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820. The accident occurred while the patient was under the influence of an anæsthetic, and during that time the nurse was under the control of the doctors and subject to their orders, and so was their servant. It was the doctors' duty to see that the bed was in proper order. By the doctors' orders, bricks were taken out while the patient was being put to bed. The facts in this case are most material, especially the circumstance that the doctors had charge of the patient, and the nurse was subject to their directions at the time of the accident. If there were any carelessness, it was that of the doctors. There was no contract on the part of the defendants to nurse the patient. They only contracted that she was to be admitted to the hospital and charged \$9 a week for room and board. Therefore the defendants are not liable for the negligent act of the nurse: *Hall v. Lees*, [1904] 2 K.B. 602; *Evans v. Mayor, etc., of Liverpool*, [1906] 1 K.B. 160; Taylor's Medical Jurisprudence, 6th ed., vol. 1, pp. 87 *et seq.*; *Perionowsky v. Freeman* (1866), 4 F. & F. 977; *Ward v. St. Vincent's Hospital* (1903), 78 App. Div. N.Y. 317. Even if the nurse were the servant of the defendants, there are many authorities which hold that a public charity cannot be made liable for the acts of its servants; that damages cannot be recovered from a fund held in trust for charitable purposes: *Holliday v. St.*

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Leonard's Shoreditch (1861), 11 C.B.N.S. 192; *Gable v. Sisters of St. Francis* (1910), 227 Pa. St. 254; *Downes v. Harper Hospital* (1894), 101 Mich. 555; *Glavin v. Rhode Island Hospital* (1879), 34 Am. Reps. 675.

Hutcheson, in reply. The "trust fund" theory is no longer law in England or Ontario: *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93.

December 10. RIDDELL, J.:—The Smith's Falls Public Hospital is an incorporated body, conducting a public hospital in the town of Smith's Falls; there are no shareholders or capital stock, and the institution is conducted not for private profit but simply as a public charity and for the benefit of the community—a most admirable and commendable object.

The plaintiff, Mrs. Laveré, suffering from *prolapsus uteri*, was advised by her physician, Dr. Gray, to go into the hospital and be operated upon. She accordingly went to the hospital of the defendants and selected her room, agreeing to pay \$9 a week, "to include her board and attendance and nursing."

She was operated on (successfully) under an anæsthetic by Dr. Gray, Dr. Ferguson assisting; and then she was taken to her own selected room and put to bed, still unconscious. On recovering consciousness, she felt a severe pain in her right foot; and, on the surgeon being sent for, he discovered a serious burn on her right heel about the size of a fifty cent piece; a blister had formed—Dr. Redditch thinks the burn must have been at least a quarter of an inch in depth. The plaintiff was treated properly, and she left the hospital at the end of seven weeks with the burn about healed; but she still has a scar at the *locus*, of about an inch by an inch and a half. This is not only painful but also disabling; there does not seem to be much hope of improvement unless an operation be performed, and the result of such an operation is doubtful.

She brought an action against the hospital, which was tried before Mr. Justice Britton at Brockville on the 26th May, 1915; the learned Judge decided in favour of the defendants (34 O.L.R. 216), and the plaintiff now appeals.

There can be no possible doubt that the burn was caused by

an over-heated brick being placed against the foot of the anæsthetised and unconscious plaintiff; that this was done by the nurse in charge; and that such an act was improper. There can be no doubt of the liability of the nurse civilly in tort, unless she can justify herself by a command of some one she was bound to obey; but the nurse is not sued here. The sole question is, whether the hospital is liable for this act of its nurse.

The matron was the head of the nursing staff; a trained nurse herself, she was the superintendent of the nurses. She selected the nurses, hired and discharged them, subject to the approval of the Board.

The nurses, in addition to board, etc., received a "honorary" in money ("honorarium," which really means a gift on assuming an office, is now often used as equivalent to "salary" by those who do not like to think they receive wages). The particular nurse to wait on the plaintiff she had nothing to do with selecting; the matron appointed her to that particular work, and she never became the servant or employee of the plaintiff, but continued the servant and employee of the hospital. She was sent by the hospital to perform for the hospital its contract to supply the plaintiff with nursing.

In the absence of authority and of special circumstances, it would be plain that the hospital is liable for her act. The cases will be examined after dealing with the circumstance most relied upon by the defendants.

It is contended that the nurse was under the orders of the operating surgeon, that she carried out his orders, and consequently the hospital could not be made liable. But this connotes a state of affairs which does not exist in the present case.

If the nurse obeyed the express order of the surgeon, she was not guilty of negligence at all. That is the duty of a nurse. Of course she must take some pains to see that she quite understands the doctor's meaning, and she must not act on what she should know to be a slip of the tongue. To put it in other words, the order she obeys must be a real order, not such as is apparently an order but so expressed that it cannot be supposed to set out the doctor's real meaning.

A nurse holds herself out to the world as being possessed of

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competent skill, and undertakes to use reasonable care. If the command of the surgeon is plainly a slip, she should call his attention pointedly to the order. When his attention has been called to the order, and he shews that the order made was that intended, she may obey; "he is the doctor," and it is not negligence for a nurse to act on the belief that he is the more competent.

In *Armstrong v. Bruce* (1904), 4 O.W.R. 327, the nurse contended that the surgeon had ordered her to fill the "Kelly pad" (upon which the unconscious patient was to lie) with boiling water. She did fill it with boiling instead of hot water, with the result which was to be expected. The patient sued the surgeon for damages; the defendant and other surgeons swore that the nurse had been told to fill the pad with hot water (not boiling water), and the trial Judge believed them. My learned brother said (p. 329): "I have no manner of doubt that if the doctor had said to any experienced nurse that she was to fill that pad with boiling water, it would have struck her as an extraordinary thing, and one calling for some explanation. . . . It was a thing that could not have been done by Dr. B., unless through a slip of the tongue."

Of course, a surgeon cannot shield himself from the results of an improper order. He has at the operation table no more right to make a slip of the tongue than a slip of the knife, and must guard against both equally.

But granted that an order is a real order of the medical man, a nurse is justified in obeying it unless it is plainly dangerous; and, not being guilty of negligence herself, she cannot by so acting render her employers liable for damages for her acting in accordance with such an order.

Here the facts do not bring the nurse into such a condition.

Where a patient is or has recently been under an anæsthetic, there is a standing order in all hospitals to keep the bed warm; "it is," says the matron, "a standing order to warm the bed;" this is taught by "the doctors originally training the nurses." The nurse under whose charge the patient is, attends to the heating of the bed, and to the heating of bricks if bricks are used for that purpose. It was the duty of the nurse "when she was

told that she had charge of the room where the patient was . . . to see that the bed was properly warmed," and "the doctor would not give her any direct order." If then the doctor finds the bed not such as he thinks it should be, he may give such orders as he sees fit, and these orders must be obeyed, but he does not ordinarily inspect the bed. As I have heard it said by a very eminent surgeon: "If I cannot trust my nurse, I must give up surgery."

My learned brother at the trial put the facts quite accurately as follows: "That narrows it to this extent, it is the duty of the nurse in the first place to do as suggested to her, in seeing that the bed is properly warmed for the patient, and then if the doctor comes in it may be his duty to see if it is over-heated or under-heated, and give his directions in regard to that; but, in the absence of any directions in regard to that, it stands that it is the nurse's duty."

There is much evidence, more or less loose, about the nurses being under the doctor's orders and the like, but the above fairly represents the result of the evidence taken as a whole.

In the present case the operating surgeon assisted in placing the patient in her bed after the operation, but took it for granted that the bed was properly heated, made no inquiries and gave no orders—and indeed such was the usual course; "they" (the doctors) "consider them" (the nurses) "all right, competent."

It cannot, therefore, be successfully contended that the nurse, in placing as she did an over-heated brick to the foot of the patient, was following the doctor's orders; and it is quite clear that he knew nothing about what she did, and that he gave no directions of any kind.

The main contention of the defendants is, that they are not liable for the negligent act of the nurse, and many cases are cited in support of that proposition.

The first English case in point of time relied upon is *Perionowsky v. Freeman* (1866), 4 F. & F. 977. There the plaintiff came into St. George's Hospital in London suffering with a disease which required a warm hip-bath, which was ordered by the surgeons. The nurses gave him a hip-bath, hot, too hot, so

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hot that he was severely scalded, but the surgeons were not near to give specific directions. They followed the usual course, "gave their directions that patients were to have hot baths, and left it to the nurses to see to the baths . . . the usual hospital practice . . . a surgeon no more knew what was a fit temperature of hot water for a bath than a nurse, who was necessarily quite familiar with it." The patient sued the medical men; but it was proved that they had no control over the nurses as to appointment or dismissal, and therefore the relationship of master and servant did not exist, and, as the Lord Chief Justice, Sir Alexander Cockburn, said, they "would not be liable for the negligence of the nurses, unless near enough to be aware of it and to prevent it." The defendants had a verdict.

In that case the hospital board were not sued, and there is no suggestion anywhere in that case that the board would not have been liable if they had been sued. No doubt, it satisfactorily decides that, had the plaintiff in this case sued Dr. Gray, instead of the hospital, she could not have succeeded, but it decides nothing more.

In *Hall v. Lees*, [1904] 2 K.B. 602, an association called the Oldham Nursing Association was formed to supply aid and instruction in skilled nursing by nurses located in Oldham. It appointed nurses and paid their salaries, making charges for the services of their nurses to those who were supplied with them. A patient who had to undergo a serious operation was supplied with two nurses by the association, one or other of whom negligently applied a hot bottle to her when still insensible from the anæsthetic, and burned her severely. The association was sued, but the action was dismissed. The Master of the Rolls in giving judgment puts the case in a nutshell (pp. 610, 611): "The question therefore is whether, under the circumstances of the case, and having regard to the rules and regulations of the association and the other documents, the contract is to nurse the patient, or only to supply a nurse to the patient." The learned Master of the Rolls, after discussing the rules and regulations, etc., comes to the conclusion (p. 614): "The correct view of the contract is that the association merely undertook to supply competent nurses, who were to be under the orders of the patient's medical

man and not the servants of the association, for the purpose of nursing the patient. . . . When the association sent the nurses, I do not think they were sending them to do in their place that which they had themselves undertaken to do. They never undertook . . . to nurse the female plaintiff, but only to supply a competent nurse for that purpose." Stirling, L.J., says (p. 615): "The question broadly stated is whether the association contracted to nurse the female plaintiff, or merely to supply properly qualified nurses for that purpose." He thinks that there was no power in the association to interfere with the nurse, once supplied, in "her duties in nursing the patient as between her and the employer." Mathew, L.J., puts his decision squarely on the ground that "the plaintiffs" (i.e., the patient and her husband) "were the nurses' employers for the purpose of nursing the patient" (p. 618). The Court was unanimous, and the action was dismissed.

It seems to me that the *ratio decidendi* of the case just cited is conclusive of the present. The test is, did the defendants undertake to nurse, or did they undertake only to supply a nurse? The matron herself says that the \$9 paid per week was to include nursing; and this concludes the defendants from denying that they contracted to nurse the patient.

Evans v. Mayor, etc., of Liverpool, [1906] 1 K.B. 160. The Corporation of Liverpool had a fever hospital, to which a child suffering from scarlet fever was taken; the medical man in charge ordered the child's discharge, and he was taken home; it turned out that the discharge was premature, and three of the boy's brothers contracted the disease. The father sued the corporation for the expense he had been put to, but failed. The jury found that from the facts there was to be implied an undertaking by the corporation that their physician should act with reasonable care and skill. But the Court (Walton, J.) held, in the circumstances of the rules, etc., that the doctor, while he was an officer of the corporation, and in certain matters had to obey the directions of the committee, was responsible for the freedom from infection of the patient when discharged. The corporation had no power to control his opinion in any kind of way, and indeed it would be wrong for them to attempt to do so.

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The finding of the jury was set aside and the action dismissed; but that case has no bearing on the case under consideration; the defendants there did not undertake to discharge the boy at the proper time, but only when the doctor said so.

Certain expressions in *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, are strongly pressed upon us; but all these must be read in connection with the facts of the case. As is said in *Quinn v. Leathem*, [1901] A.C. 495, at p. 506: "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expository of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

Hillyer, a medical man, entered St. Bartholomew's Hospital, in London, solely for the purpose of being examined gratuitously under an anæsthetic; there was no bargain of any kind expressed. Mr. Lockwood, a consulting surgeon attached to the hospital, examined him, but through some carelessness Hillyer's arm was allowed to come into contact with a hot water tin and was badly burned, and also bruised in some way. He sued the hospital, but his action was dismissed by Grantham, J. In appeal the decision of the trial Judge was affirmed. Farwell, L.J., expressly approves *Glavin v. Rhode Island Hospital* (to be considered later), and holds that the doctors were not at all the servants of the board, but "all professional men, employed by the defendants to exercise their profession . . . according to their own discretion . . . in no way under the orders or bound to obey the directions of the defendants." "It is true that the corporation has power to dismiss them, but it has this power not because they are its servants but because of its control of the hospital where their services are rendered."

The learned Lord Justice considers the nurses to be on a different footing, and assumes that they are the servants of the corporation; but he says (p. 826): "Although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers; . . . as soon as the door of the theatre or operating room has closed on

them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants. . . . The nurses . . . assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone." Then he says: "The contract of the hospital is not to nurse during the operation, but to supply nurses. . . I take the test applied" (in *Hall v. Lees*) "by Lord Collins, then Master of the Rolls: 'They are not put in his place to do an act which he intended to do for himself.' The nurses . . . are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves, because they had not undertaken to operate or assist in operating." Kennedy, L.J., while holding the defendants not liable, does appear to hold that the hospital, "by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care," do not undertake that the nurses shall use proper care; but this is far from saying that in an express agreement for nursing, the contract is only to supply a competent nurse. Cozens-Hardy, M.R., agrees in the result.

It will be seen that this case does not carry us further, when considered in relation to its facts; one Lord Justice confines his remarks to the operating room, while the remarks of the other are made in the case of a person coming to a hospital solely to be examined (and consequently not expecting to be out of the operating theatre or to receive nursing) without any special contract. The expressions so made use of are not intended to be an exposition of the whole law, and are not to be taken literally in a case wholly different in its facts.

The duties of the nurse, when the default occurred in the present case, were not to assist the surgeon "in matters of professional skill," but to "perform domestic duties in the way of seeing that the bed was right," "with everything in order," as the matron swears.

I find nothing helpful in the cases referred to in Taylor's *Medical Jurisprudence*, 6th ed., vol. 1, pp. 87 *sqq.*

The Irish cases are not helpful. In *Dunbar v. Guardians Ardee Union*, [1897] 2 I.R. 76, the son of the plaintiff was a

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patient in the workhouse hospital of the defendants, Poor Law Guardians; his death was caused—at least accelerated—by neglect to provide him as a patient with the care and attention which he required. The mother sued under Lord Campbell's Act, but the action was dismissed. In that case the nurse did all she could, but the master and perhaps the porter failed to do their duty, whereby the patient escaped from the hospital, and suffered severely from exposure. The Court at the trial dismissed the action; this was affirmed by the Exchequer Division, and the plaintiff took the case to the Court of Appeal. That Court approved *Levingston v. Guardians of Lurgan Union* (1867), I.R. 2 C.L. 202, that Guardians are answerable to their patients for the wrongful acts, and apparently the negligently injurious acts, of those acting under their orders or on their behalf; but held that, on the proper construction of the statute of 1838, the Irish Poor Relief Act (1 & 2 Vict. ch. 56), the ministerial work of poor law relief is intrusted to officers whose *status* is recognised as to some degree independent of the Guardians, and who are rather parts of the system controlled by the Commissioners, than servants or agents of the Guardians, discharging duties which primarily fall on the Guardians themselves. To paraphrase the decision—the duty of the Guardians is not to care for the poor but to appoint officers to do so.

The Court approved a former case of *Brennan v. Limerick Guardians* (1878), 2 L.R. Ir. 42, which decided that in such cases the Guardians were not liable because they had done their own duty. All they were required by the statute to do was to appoint the officers.

The same principle is laid down in a case not in other respects applicable, *O'Neill v. Drohan and Waterford County Council*, [1914] 2 I.R. 41; same case in appeal, *ib.* 495.

The Scottish case of *Foot v. Directors of Greenock Hospital*, [1912] Sess. Cas. 69, is next to be considered. The plaintiff had her leg broken and was advised by her doctor to go into the Greenock Infirmary "in order to have the advantage of the medical appliance there." She went as a paying patient, but without any special contract; the house surgeons, it was alleged, treated her in an unskilful and negligent manner, to her great

physical and pecuniary loss and injury. She sued the hospital, but the Court held she could not succeed, as, in the absence of a special contract, the hospital undertook to furnish to the public the services of competent medical and surgical practitioners, and nothing more. It is pointed out that the board had no control over the doctors, and could not interfere with them except to discharge them. To paraphrase the language in *Hall v. Lees*, what the defendants undertook to do was not to treat the plaintiff through the agency of the doctors, their servants, but merely to procure for her duly qualified doctors. Had there been a special contract to treat her, as in our case to nurse the plaintiff, the case would be, in my opinion, wholly different.

The American cases are not few; some of them will be mentioned.

In *Benton v. Trustees of Boston City Hospital* (1885), 140 Mass. 13, the trustees of the hospital were held not liable for the negligence of the superintendent of the hospital who left the stairs unsafe. The Court held (1) that the defendants were but the managing agents of the city in maintaining the hospital. This is quite in accord with our law, and is alone sufficient to dispose of the case: *Ridgway v. City of Toronto* (1878), 28 U.C.C.P. 579; *McDougall v. Windsor Water Commissioners* (1900-01), 27 A.R. 566, 31 S.C.R. 326. The Massachusetts Court, however, goes further and holds (2) that the city would not be liable, and (3) consequently the trustees could not be. The former of these conclusions is to be found in very many of the American decisions, and it is based upon the principle which is laid down in *Holliday v. St. Leonard's Shoreditch* (1861), 11 C.B.N.S. 192, 30 L.J.C.P. 361, 4 L.T.N.S. 406, 8 Jur. N.S. 79, 9 W.R. 694. It may be thus stated (substantially in the words of the head-note in 11 C.B.N.S.): "Persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of servants employed by or under them." This was supposed to be the law of England, but it received its quietus in *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, 119, 11 H.L.C. 686, 723. See also *Foreman v. Canterbury Corporation*

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(1871), L.R. 6 Q.B. 214; *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, *ut supra*.

In Massachusetts this assumed principle was applied to a city in *Hill v. City of Boston* (1877), 122 Mass. 344, the *locus classicus* in which the earlier cases are reviewed.

Tindley v. City of Salem (1884), 137 Mass. 171, decides that the exemption extends to acts in the discretion of the city, and is not confined to acts done in performance of a duty, statutory or otherwise.

Then an offshoot from this doctrine, logically distinct but analogous, is the theory that where any individual or corporation carries on any undertaking for the benefit of the public with funds mainly derived from public and (or) private charity held in trust for the purposes of the undertaking, he or it cannot be held liable for the negligence of servants selected with due care. This is laid down in *McDonald v. Massachusetts General Hospital* (1876), 120 Mass. 432.

I do not further investigate the decisions in Massachusetts, as the law there is not the same as ours.

In New York, *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij* (1887), 107 N.Y. 228, decides that a steamship company has (in the absence of a statute or, I add, a special contract) done its full duty by a passenger when it supplies him with a competent surgeon, and is not liable for the negligence of the surgeon supplied.

In *Ward v. St. Vincent's Hospital* (1903), 78 App. Div. N.Y. 317, the contract sued upon was "to furnish the services of a skilled and experienced nurse to the plaintiff while she was undergoing a surgical operation and recovering therefrom in" the defendants' hospital (p. 319). The nurse supplied was skilled and experienced, but failed in this instance; and the Court held that the contract had been carried out; an inevitable result. The defendants did not undertake to nurse, and they did supply a skilled and experienced nurse, which was all they were called upon to do by their contract.

Cunningham v. The Sheltering Arms (1909), 119 N.Y. Supp. 1033, shews that it is the law of New York that "a charitable institution, from which no financial benefit accrues to its direc-

tors or organisers, is not liable to a recipient of its charity (for damages) resulting from the negligence of one employed in furtherance of its objects, provided due care is exercised in selecting the employee." But even here the absence of a special contract is of importance; the Court refers to *Ward v. St. Vincent's Hospital*, 50 N.Y. Supp. 466, 39 App. Div. N.Y. 624, 65 App. Div. N.Y. 64, 78 App. Div. N.Y. 317. That was a case of a patient making "an express contract whereby the defendants agreed to furnish her a skilled, competent, and trained nurse" (57 N.Y. Supp. 784). She was furnished "a mere pupil in the defendants' training school, not a trained nurse, in the sense of being a graduate, having studied only nine months." The nurse, while the plaintiff was unconscious, applied an unprotected rubber bag containing very hot water to the patient's leg and caused serious injury, and an action was brought against the hospital. The trial Judge held that the action was in tort (as it might undoubtedly have been had it been brought against the nurse), and that there was no breach of duty on the part of the hospital; he accordingly dismissed the action, and his decision was affirmed by the Supreme Court (50 N.Y. Supp. 466). On appeal the Appellate Division held that the action against the hospital was in contract, i.e., the contract to supply a skilled, competent and trained nurse, and that, while one act of negligence would not necessarily prove the nurse not to be such, a jury might infer that this act of negligence was attributable to her inexperience and lack of skill. A new trial was ordered. On the new trial the plaintiff had a verdict for \$10,000, but the trial Judge refused to charge the jury that the defendants were not bound to assign to the plaintiff the best nurse in the hospital, but only a nurse ordinarily well trained and ordinarily competent and skilful, and the unfortunate plaintiff, the flesh on whose leg had been "literally cooked to the bone," had to have another trial: 65 App. Div. N.Y. 64. This time the trial Judge made another mistake by ruling out evidence, and the verdict of \$19,420 was set aside: (1903) 78 App. Div. N.Y. 317. I do not find any report of the next trial if there was one. Perhaps the plaintiff died or despaired of a trial without the Judge making a mistake, or possibly the hospital paid up. At all events

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there is nothing in that case of use in the present. It was not a contract for nursing which was in question there, but a contract to supply a particular kind of nurse.

Many cases in New York—the latest I have seen is *Schloendorff v. Society of New York Hospital* (1914), 105 N.E. Repr. 92, 211 N.Y. 125—decide that, in the absence of an express contract, the action against a hospital for the negligence of its physicians, nurses, etc., is in tort, and that the hospital is not liable unless the physician, nurse, etc., be chosen without due care: *Noble v. Hahnemann Hospital of Rochester* (1906), 112 App. Div. N.Y. 663; *Cunningham v. The Sheltering Arms* (1908-9), 115 N.Y. Supp. 576, 61 Misc. R. 501, 119 N.Y. Supp. 1033, 135 App. Div. N.Y. 178; *Wilson v. Brooklyn Homœopathic Hospital* (1904), 97 App. Div. N.Y. 37, 89 N.Y. Supp. 619.

Without expressing any opinion as to the law in Ontario in such a case, it will be sufficient to say that that is not the present case.

In Pennsylvania, a long line of cases, one of the latest of which is *Gable v. Sisters of St. Francis* (1910), 227 Pa. St. 254, makes it clear that a purely public charity cannot be made liable for the tort of its servants. This doctrine is explicitly declared to rest "fundamentally on the fact that such liability, if allowed, would lead inevitably to a diversion of the trust funds from the trust's purposes:" 227 Pa. St. at p. 258.

The same law and for the same reason is found in Michigan; see for example *Downes v. Harper Hospital* (1894), 101 Mich. 555; Ohio; see for example *Taylor v. Protestant Hospital Association* (1911), 85 Oh. St. 90, which in effect repudiates the authority of the late English cases and follows the earlier rule of *Holliday v. St. Leonard's Shoreditch*, 11 C.B.N.S. 192; Maryland; see for example *Perry v. House of Refuge* (1884), 63 Md. 20.

Glavin v. Rhode Island Hospital, 34 Am. Reps. 675, 12 R.I. 411, is in the opposite sense, and holds that where the employee of the hospital is in the situation of a servant to the hospital, the hospital is liable for the negligence of the servant in the pursuance of his duties. This case is cited with approval by Farwell, L.J., in the *Hillyer* case; it is said that the State

Legislature changed the law so as to be more favourable to the charities.

The most recent American case I have seen is one which eluded the vigilance of the diligent counsel, but was quoted and discussed during the argument. It is in the Supreme Court of Alabama, *Tucker v. Mobile Infirmary Association* (1915), 68 Sou. Repr. 4, which, if I may say so without presumption, contains a very valuable discussion of the law. There the plaintiff alleged that she went into the defendant's hospital, and the "defendant undertook and promised to properly nurse and care for plaintiff, preparatory to and during a surgical operation . . . and thereafter until she had sufficiently recovered to leave" it; that "by reason of the negligence of one of the nurses employed by the defendant . . . after she had been operated on . . . plaintiff was badly scalded with boiling water both internally and externally." The defendant pleaded that it was a charitable institution, not operated for profit, having no stock and no stockholders, and exercised due care in the selection and retention of the nurse complained of, and had no notice or knowledge of her incompetency. To this the plaintiff demurred; the demurrers were overruled, and the plaintiff appealed to the Supreme Court. The Court, Anderson, C.J., McClellan, Sayre, Somerville, Gardner, and Thomas, JJ. (Mayfield, J., dissenting), held (1) that there was no difference between the case of a patient with an express and an implied contract, citing *Duncan v. St. Luke's Hospital* (1906), 113 App. Div. N.Y. 68; (2) that a charitable hospital is in no higher position than any other corporation in respect of liability for the negligence of its servants, the "charitable trusts" theory, though supported by a great weight of authority in the American Courts, being untenable. The demurrers then were allowed. Most of the cases of moment are cited, and many discussed, in the very able judgment of Gardner, J. (speaking for the majority of the Court), and Mayfield, J., dissenting. I unreservedly approve the conclusions of the majority of the Court.

The same result is reached by Macdonald, J., in the Supreme Court of British Columbia, in *Thompson v. Columbia Coast Mission* (1914), 26 W.L.R. 861; a judgment which, like that in

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Alabama, is characterised by masculine common sense, as well as a deep knowledge of law.

The only case in our Courts of which I am aware did not go further than the trial Court. If the law was there correctly laid down—and I think it was—it would be conclusive of the present case in favour of the plaintiff. It is, however, not binding upon us; and it is not necessary in the present case to go so far as that did. In *Everton v. Western Hospital*, there was no special contract, the patient being admitted in the usual way to the Western Hospital, Toronto. He was a somewhat dissipated individual, and was suffering from pneumonia. He was placed in a ward on the top flat of the hospital building, about twenty-five feet from the ground, which at the time was frozen hard. The nurse on duty was proved to be very careful, skilful, and conscientious. She had been in the ward, looked at the patient carefully and found him quite quiet and apparently asleep. She then went out quietly into the hall to do something, but was still near the patient. Unfortunately, after this visit by the nurse, he got out of bed and made for the window, which he opened. He was going out head foremost when the nurse rushed into the ward and seized him by the night-dress; unfortunately it gave way, or she lost her hold. He sustained a fracture of the skull, and died on the 14th February, 1903. The wife brought action, and the case was tried before Mr. Justice Britton and a jury at the Toronto jury sittings. A verdict of \$250 was awarded the plaintiff against the hospital. There was no appeal, counsel (*pars magna fui*) for the hospital thinking the *Glavon* case would probably be followed.

After all the cases, it is plain that once the “trust fund theory” is got rid of—and it is conceded that it has now no footing in our law—the case is reduced to the question, what did the defendants undertake to do? If only to supply a nurse, then supplying a nurse selected with due care is enough; if to nurse, then, the nurse doing that which the defendants undertook to do, they are responsible for her negligence as in contract—*respondeat superior*.

I am of opinion that the plaintiff should succeed.

The only question remaining is as to the amount of damages to be awarded.

The patient, who should have left the hospital in two weeks, was forced to remain seven, she was then unable to walk and had to be carried out of the hospital; for more than four weeks she sat in a chair, and when she put her foot to the ground the leg would swell so as to require bandaging; a consultation of doctors resulted in the advice to return to the hospital, she being then just able to hobble, putting a little weight on the toe; she remained in the hospital nearly two months, slightly improving, but not permitted to put weight on the foot; even at the end of the time compelled to use a crutch; and now many months after, and after treatment with electricity, etc., is still lame, the foot being very painful at times; she is forced to have a pillow under the back of the heel in bed or she could not sleep. Dr. Gray thinks that the pain is caused by the implication of the nerve in the scar tissues, and that an operation would be of advantage. Dr. Reddick once was of that opinion, but, after consulting some who he thinks know more than he does and who have a different opinion, can only say: "My own opinion is still that there is a possibility of something being done by an operation . . . it is a very questionable operation, whether it would be beneficial or may be make it worse;" and he gives reasons. Dr. Ferguson had his own opinion, "that, if this pain was being caused by a nerve fibre caught in the scar, as I supposed it was, if it could be severed, it might stop the pain." In this state of medical opinion, it cannot be said that it is unreasonable for the plaintiff to refuse (if she did or does refuse) to submit to an operation.

After an examination of the cases I laid down the rule in *Bateman v. County of Middlesex*, (1911), 24 O.L.R. 84, at p. 87, that "if a patient refuse to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure, is due to his refusal and not to the original cause. Whether such refusal is reasonable or not is a question to be decided upon all the circumstances of the case." This rule was not questioned by the

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Divisional Court or the Court of Appeal: (1911-12) 25 O.L.R. 137, 27 O.L.R. 122.

Dr. Reddick, her own physician, who had attended her before and after being in the hospital, cannot do more than say that the operation might do good and might do harm. He does not seem to have advised it. In these circumstances, it cannot be said that the condition of the patient is due to unreasonable refusal to undergo the operation. Were I permitted to draw on my own experience I could tell of a patient who refused to allow his arm to be amputated—the surgeon advising the operation, but saying he could not be quite certain that it would do good. The patient made an excellent recovery, with the arm almost as useful as before.

Dr. Reddick's prognosis I give in his own words:—

“Q. Has she recovered yet? A. No.

“Q. What is your opinion as to whether she will ever recover? A. Very doubtful, to my mind, that she won't always be a sufferer more or less—perhaps get some better.”

Little evidence is given of pecuniary damage. Perhaps most of such damage is that of the plaintiff's husband, who is not a party to this action, and whom we must leave to bring his own action if so advised.

But the pain and disability, past, present, and future, call for a substantial assessment of damages; and, with every regard for the defendants' position as a most estimable charity, I think the sum of \$900 cannot be regarded as excessive.

The appeal should be allowed with costs, and judgment entered for the plaintiff for the sum of \$900 and costs.

It may not be amiss to add a few statements:—

(1) We proceed on the ground of an express contract to nurse, and express no opinion as to the law in the ordinary case of a patient entering the hospital without such contract.

(2) As a corollary of the above (while we think an implied contract has the same effect as an express contract in the same terms) we express no opinion as to the contract implied from a patient entering a hospital.

(3) We express no opinion as to what the result would have been had the negligence occurred in the operating theatre.

(4) None of the cases in any of the jurisdictions expresses any doubt that, whether the hospital is or is not, the nurse is liable for her negligence in a civil action in tort; in some cases also criminally for an assault, simple or aggravated, and in fatal cases for manslaughter.

(5) There is no hardship in the present decision. The hospital can protect itself as was done in *Hall v. Lees* and in some of the American cases.

LATCHFORD, J.:—The contract between the parties expressly included the nursing of the plaintiff; and the damages which she sustained resulted undoubtedly from the negligence of a person employed by the defendants to do that nursing.

In the circumstances, I think the maxim *respondeat superior* applies. "He who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it:" Best, C.J., in *Hall v. Smith*, 2 Bing. 156, 160.

This principle is not, in the case at bar, subject to exception because of the exemption from liability enjoyed ordinarily by a hospital for the malpractice of a physician or surgeon selected by the hospital with reasonable care. The ground for that exception is that he is not the servant of the hospital. The hospital does not undertake to treat the patient through the agency of the physician, but only to procure his services for the patient. This is the principle of the decision in *Hall v. Lees*, [1904] 2 K.B. 602, where an organisation which undertook to provide nurses—not to do nursing—was held not liable for the negligence of one of its nurses. Nor would the defendants be liable if the nurse was, at the time her negligence caused the injury, acting as the agent of the physicians, and not as a servant of the defendants. In such a case the hospital would be no more liable for her negligence than for that of the physician: *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820.

The law as to the liability of a hospital for the negligence of a servant employed by it is ably reviewed in *Glavin v. Rhode Island Hospital*, 34 Am. Reps. 675. The hospital was held liable on the ground that the relation of master and servant existed

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between it and the intern through whose negligence the plaintiff was injured. It is true that in 1882 the Legislature of Rhode Island passed a statute, ch. 162, exempting hospitals, maintained by charitable contributions or endowments, from liability in such cases—as organisations administering definite trusts were and are exempt; but, so far as I can ascertain, no doubt has ever been cast upon the correctness of the decision.

It is mentioned by Beven, 3rd ed., vol. 2, p. 1165, as eliminating the doubtful elements in the earlier case of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, and as making a searching investigation into the principles applicable where the trustees of a public hospital are sued for unskilful treatment of a patient.

It is cited with approval in a judgment of the Supreme Court of New Brunswick: *Donaldson v. Commissioners of General Public Hospital in St. John* (1890), 30 N.B.R. 279. Fraser, J., says (p. 299): "I adopt in their entirety the judgments delivered in *Glavin v. Rhode Island Hospital*, by Durfee, C.J., and Potter, J."

The *Glavin* case was considered in the New Zealand Court of Appeal in *Auckland District Hospital and Charitable Aid Board v. Lovett* (1892), 10 N.Z.L.R. 597, where the relation of master and servant was held not to exist between the hospital and its medical superintendent selected with due care. Williams, J., while stating that direct English authority on the point at issue was scanty—as indeed it was at that time—says (p. 605): "The law appears to me, however, to be correctly laid down in the case of *Glavin v. Rhode Island Hospital*."

To the same effect is the recent Alabama case, referred to upon the argument by my brother Riddell as containing an exhaustive review of the law applicable to the present case.

The only difficulty which this case presents is one of fact. Was the nurse whose negligence caused the injury acting at the time as the servant of the defendants—nursing the plaintiff as the defendants had contracted to nurse her—or was she the agent in what she did of the attending physicians?

The evidence on the whole seems to me conclusive that she was engaged in a matter of routine nursing—doing for the de-

defendants part of the very service which they had contracted to render to the plaintiff. The defendants are, therefore, liable for her negligence.

I agree that a reasonable amount to award as damages is \$900, and think judgment should be entered in the plaintiff's favour for that sum, with costs here and below.

KELLY, J.:—On the 1st February, 1913, the plaintiff, a married woman, who was suffering from internal trouble, after consultation with her physician, entered the Smith's Falls Hospital with the object of undergoing a surgical operation. The operation was performed on Monday the 3rd February, at the hospital, by Doctors Gray and Ferguson of Smith's Falls, whom the plaintiff had selected. It is stated in the evidence that all the doctors resident in Smith's Falls brought patients to and attended patients in this hospital.

After the operation, and while still under the influence of an anæsthetic, the plaintiff was removed to her room by one of the doctors who had operated and nurses engaged in the hospital.

The practice is, in this as in other hospitals, to have the bed well heated in which a patient is to be placed after an operation; and this is accomplished, the evidence shews, by placing in the bed hot objects, such as hot water bottles, hot bricks, etc. Such preparation was made in this instance; and two of the nurses say that when they brought the patient to her room after the operation they saw some bricks wrapped in paper on the bed.

The operation took place between nine and ten o'clock in the morning, and from the evidence it appears that the patient did not regain consciousness from the effects of the anæsthetic until late in the afternoon, when she complained of a pain in her foot, and on investigation, as shewn by the evidence of the medical men who examined and afterwards treated her, this was found to have been from being burned by a brick which remained in the bed after her return from the operating room. The action is brought for damages for the injury. The trial Judge, who tried the case without a jury, dismissed the claim, on the ground mainly that the relationship of master and servant does not

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exist between the directors and the physicians and nurses and other attendants assisting at an operation.

It becomes important, therefore, to determine not only what was the contract between the parties to the action, but also the relationship between these parties and the surgeons and nurses at the time of the happening which caused the injury.

The learned trial Judge in his reasons for judgment finds that the plaintiff applied to the defendants for admission, and that it was agreed that she would be admitted to a room of her own selection; that the charge would be \$9 a week for room and board; that she paid \$9, being one week in advance; that nothing was specially said about attendance, but a nurse in training had charge of the room which she occupied, and the attendance reasonably necessary was implied in the arrangement made; that the customary attendance was—and it was so in this case—that a nurse in training should have charge of certain rooms, and to one was assigned the room of the plaintiff.

The evidence quite supports the view that the contract was that attendance reasonably necessary was included; indeed it is sworn to by the lady superintendent, who, on the plaintiff's admission to the hospital, told her what the fee would be—that that fee was to include her board and attendance and nursing. The liability arising from such a contract is distinguishable from that under a contract merely to supply a nurse for the patient. Under the former, liability attaches to the person or body agreeing to do the nursing for want of care by those whom they engage to do that service, unless in certain excepted cases such as I shall later on refer to; under the latter, the duty and the consequent liability for its disregard are limited to the using of due care and skill in the selection of nurses. The distinction was considered at length in *Hall v. Lees*, [1904] 2 K.B. 602. The defendants, an association whose object it was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood, and who for that purpose appointed and paid salaries to nurses for whose services they made charges to persons on whose application the nurses were supplied, were sued for an injury resulting to a patient from what was said to be the negligence of two nurses engaged to nurse her, and it was held

that the contract with the defendants was, not to nurse the patient through the agency of the nurses as their servants, but merely to procure for her duly qualified nurses, and that the nurses were not nursing the female plaintiff acting as the servants of the association, and, therefore, the defendants were not liable in respect of the negligence of the nurses so supplied. The Court clearly drew the distinction between the two classes of contract, and Collins, M.R., at p. 610, laid it down that the question of whether the association who supplied the nurse is responsible to the patient for the consequence of her negligence depends upon the true effect of the contract between the association and the person to whom the nurse was supplied, and that "if the association undertook to nurse the patient, then they are responsible for the failure of the person by whom they nursed her to use due care."

The same view was expressed by Kennedy, L.J., in the later case of *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, At p. 829 he says: "It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patient for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patient for their sufficiency, their propriety, and observance of them by the servants."

This liability of the hospital is, however, subject to qualification and exception in cases where for the time being the nurse ceases to be in performance of duties for the hospital, and where, at the time of the injury charged to the nurse's negligence, the latter is solely under and subject to the order and direction of the physician or surgeon in whose care the patient is. This qualification is traceable to and is consequent upon the relationship between the hospital and the physicians and surgeons who compose the staff. That relationship in the very

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nature of things is essentially not one of master and servant in its ordinary acceptance. In respect to the professional staff in attendance the only duty undertaken by the governing body of a public hospital towards a patient who is treated in the hospital, is to use due care and skill in selecting those who compose that staff, and these when appointed are not, in the exercise of their professional skill, under the orders or bound to obey the directions of the hospital. In the discharge of his professional duties, such as the performance of a surgical operation, the surgeon is supreme and is not subject to the control of or interference by the hospital. This is essential to the success of the operation; and in such circumstances the hospital, if it has chosen its staff with due care, has in that respect fulfilled its obligation to the patient.

This opinion is expressed in an elaborate judgment of the Supreme Court of Rhode Island in the case of *Glavin v. Rhode Island Hospital*, in 1879, reported in 12 R.I. 411. The subject was there discussed at length, and both English and American cases were considered. The case was the subject of much adverse criticism by the respondents' counsel in the course of the argument before us. I find it, however, cited with approval as recently as 1909 in the *Hillyer* case, cited above. It was also approved by the Supreme Court of New Brunswick in 1890 in *Donaldson v. Commissioners of General Public Hospital in St. John*, 30 N.B.R. 279, and by the Court of Appeal of New Zealand in 1892 in *Auckland District Hospital and Charitable Aid Board v. Lovett*, 10 N.Z.L.R. 597.

In the present state of the authorities, that may be taken as the law on the subject of the relationship between the hospital and its staff of physicians and surgeons. The relationship of the nurse, while assisting the physician or the surgeon in the performance of his professional duties towards the patient, must also be considered, and it is on this aspect of the case that the defendants ground their claim to immunity from liability. Nurses employed by the hospital, though they may be its servants for general purposes, are not so for the purposes of operations, in which they take their orders from the surgeon alone, and not from the hospital. The relative position of the parties

in such conditions is stated in the *Hillyer* case, the effect of the judgment in which is that the relationship of master and servant does not exist between the governors and physicians and surgeons who give their services at the hospital; and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that time from the operating surgeon alone, and not from the hospital authorities. At p. 826, Farwell, L.J., says, speaking of the relationship between the physicians and surgeons of the staff, that the nurses stand on a somewhat different footing; that, assuming that they are servants of the hospital for general purposes, they are not so for the purpose of operations and examinations by the medical officers—"If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders."

If, therefore, in the present case, the nurse responsible for the injury to the plaintiff was, in the sense indicated by these authorities, acting in obedience to the orders of the doctor, liability of the defendants would not arise. The evidence, however, fails to establish that position; and it is in that regard that I think, with all due respect, the trial judgment errs. As I view it, what was done by the nurses with reference to the heating of the bed for the plaintiff was not in obedience to the orders of the doctors, but was a matter of routine duty under the direction of the defendants. The practice, above referred to, of heating the bed for the patient, was in this instance observed, hot bricks wrapped in paper having been used. Some of these were removed before the plaintiff was put to bed, but through some oversight the one which did the damage remained. The evidence of the lady superintendent of the defendants is im-

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portant on this question. She is asked on cross-examination (p. 68) :—

“Q. His Lordship is asking, as I understand it, in regard to the preparation of the bed; is there anything special about that? A. Nothing special. It is a standing order in all hospitals that a bed for a patient under an anæsthetic is well heated.

“His Lordship: Now then, Miss Thomas knew when she was told that she had charge of the room where that patient was, didn't I understand you to say before that it was her duty to see that the bed was properly warmed? A. Yes.

“Q. That would not be in accordance with any doctor's orders? A. Not in her special case. The doctor would not give her any direct order.”

And at p. 69:—

“Q. Take a case where the patient is put to bed in an unconscious condition, has the nurse any discretion to exercise, has she any duty to exercise, or who exercises discretion then, about the condition? A. I think the nurse would.

“Q. Would do what? A. Use her discretion.

“Q. About what? A. About the warming or cooling the room.

“Q. But would she be subject to any order in regard to that? A. I think the doctor would order her.

“Q. That is what I was getting at, the doctor would order her?

“His Lordship: That narrows it to this extent, it is the duty of the nurse in the first place to do as suggested to her, in seeing that the bed is properly warmed for the patient, and then if the doctor comes in it may be his duty to see if it is over-heated or under-heated, and give his directions in regard to that; but, in the absence of any direction in regard to that, it stands that it is the nurse's duty.

“Mr. Watson: Do you know if the doctor ordinarily inspects the bed, or does he not? A. I think not.”

And on p. 70:—

“Q. And then I understand you that the nurses are performing domestic duties in the way of seeing that the bed is right? A. Yes.”

Neither Dr. Gray nor Dr. Ferguson gave any orders about heating the bed. Dr. Gray was asked (p. 79) :—

“Q. Did you give any orders about heating the bed or anything of that sort? A. No.

“Q. Did you see the room at all before she was taken to it, just immediately before she was taken to it? A. I don’t recollect.”

And at p. 80 :—

“Q. And did you give any definite or specific instructions to any nurse at any time while she was an inmate of that ward? A. Not that I recollect.”

Dr. Ferguson was asked (p. 87) :—

“Q. Did you give any orders regarding the room she was to occupy, as to specific directions? A. No.

“Q. Did you see the room or examine the bed in it before she was taken to it? A. No.

“Q. Did you see whether or not any means were supplied to heat the bed? A. I did not look for any. I don’t recollect that I did.

“Q. You do not recollect that you did? A. No.

“Q. You made no inquiries? A. No.

“Q. And gave no instructions? A. No.”

To me the plain meaning of the evidence is that, in preparing and heating the bed, the nurses were not acting under the control and directions of the doctors, but were performing routine duties in their capacity as the servants or representatives of the defendants. In that view, the defendants are liable, the case resting on the defendants’ contract, which included nursing the plaintiff, and, as found by the learned trial Judge, attendance reasonably necessary being implied in the arrangement made.

The line of liability may be difficult to draw in instances where doubts arise as to the real contract; but the contract in the present case is sufficiently clear to exclude that difficulty. Moreover, the rules and regulations under which the hospital carries on its work, and subject to which patients are admitted, may play an important part in determining the liability of the institution to the patient. In every case the rights and liabilities of the parties must be considered with these in view.

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In addition to the authorities already cited, *Footte v. Directors of Greenock Hospital*, [1912] Sess. Cas. 69, may be referred to; and also *Tucker v. Mobile Infirmary Association*, a judgment delivered in the present year by the Supreme Court of Alabama, reported in 68 Sou. Repr. 4, which contains an exhaustive discussion of the law and a review of many cases.

Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93, is authority against the contention that damages for negligence of their servants are not recoverable from the defendants, a body operating gratuitously a public hospital.

On the question of damages I am in accord with the other members of the Court. I think \$900 not an unreasonable sum to award. The appeal should be allowed with costs and judgment entered for that sum with costs.

FALCONBRIDGE, C.J.K.B.:—I had prepared a judgment proceeding along the same lines and reaching the same conclusion as that arrived at by my learned brothers. But, having been favoured with a perusal of their opinions, completely covering the whole ground, I consider it inadvisable to overburthen the reports with another pronouncement, and I therefore content myself with concurring in their judgments.

The appeal is allowed and judgment is to be entered for the plaintiff for \$900, with costs here and below.

Appeal allowed.

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[APPELLATE DIVISION.]

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WILLS V. FORD AND DOUCETTE.

Contract—Brokers—Loan of Company-shares—Terms—Deposit of Security at Market Price—Offer to Return Shares—Refusal of—Tender—Price of Shares—Rise in Value—Action for Return.

“Borrowing” in stock-broking circles does not imply a return of the very stock certificates “borrowed;” the loan is repaid by the return of stock certificates of the same amount and kind of stock as that borrowed; the borrower has the right to return the stock or any part of it at any time and demand the return to him of the amount of money paid by him as security for that stock or an aliquot part thereof.

The plaintiff, a broker, who “lent” shares in a mining company to the defendant, also a broker, upon the above terms—the defendant putting up as security a sum of money representing the market value of the

shares "lent" at the time of the lending—was asked by the defendant, when the price of the stock went down, to refund the money and take back the shares, but refused to do so. When the shares came up to the price at which the loan was made, the defendant sold them:—
Held, that no formal tender was necessary; and that the plaintiff's action for a return of the shares, bought after the price had risen beyond that at which the loan was made, was properly dismissed.
 Judgment of MEREDITH, C.J.C.P., affirmed.

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ACTION for the return of 250 shares of Dome Mines stock, for an account, and damages.

October 6. The action was tried by MEREDITH, C.J.C.P., without a jury, at Toronto.

M. P. Vandervoort, for the plaintiff.

A. L. Smith, for the defendant Doucette.

MEREDITH, C.J.C.P. (at the conclusion of the hearing):—
 This is a very simple case between lender and borrower. The plaintiff lent to the defendant Doucette, through the defendant Ford, the shares of stock in question. As security for the return of the shares, a sum of money was paid, as to about half of them \$9 per share, and as to the rest \$9.50 per share, an amount considerably greater than the actual value of the shares at the time.

A good deal has been said about the Stock Exchange and its rules. The case is not complicated at all by any such question. Neither the rules of the kerb nor the rules of the Mining Stock Exchange, if that is what these things should be called, really affect any material question at issue between the parties. The plaintiff is suing for a return of the property which he lent to the defendant. The defendant's answer is that he was willing and anxious to return it, but the plaintiff would not have it. If that is so, it is a good answer to this action. No question of the rules of the Stock Exchange, of the kerb, or of anything else, is involved, except the rules of the common law and of the equitable right to redeem.

The plaintiff says: "It is true that I would not accept it, but you did not make a legal tender. Therefore my refusal amounts to nothing," or rather amounts to that which he calls "jollyng" the other party along. Well, it is a sort of jollyng that in this case ends, so far as this trial is concerned, in the

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plaintiff failing to succeed. It is quite certain that at no time up to the time in March when the value of this stock began to increase rapidly, was the plaintiff ever willing to take back the stock, and I think I can safely say that he was never able to take it back. So that a tender would not have helped him, and a tender was excused by his positive refusal to take back the stock—a refusal expressed plainly to the defendant Ford, not once, but several times, up to and after the time when this Mining Stock Exchange, or whatever may be its proper name, was reopened for business unrestrictedly.

Now, does the law allow a man in that position to come into Court afterwards when the stock happens to be valuable, and just because it happens to be valuable, and demand the increased price of that stock? Because that is what the plaintiff is really doing. He would not take it when he might, and when it would not have been any advantage to him to have taken it; and I think that, in the circumstances of this case, equity must say: "You cannot take it now merely because you expect to put a lot of money in your pocket through doing so. Your equitable right to redeem is assuredly gone." And in law it may be that what took place was a breach of the contract on the plaintiff's part for which he is answerable in damages, but the defendants have not put forward any claim of that nature.

There were negotiations between the parties, and there were statements in regard to delaying the return of the stock until after the Stock Exchange opened again. But I am not at all satisfied that there was any concluded bargain between the parties which lessened the defendant's legal right to return the stock at any reasonable time, notwithstanding that the Stock Exchange was closed. Except by agreement between the parties, the mere fact of the Mining Stock Exchange being closed did not affect the common law or equitable rights of these parties. If they are affected at all, it is by agreement in regard to the closing of that Exchange. I am not able to say, on all the correspondence, or otherwise, that there was a concluded agreement between the parties by which any common law or equitable right of the defendant to return the stock and get back his money was affected; but, even if there had been, after the Stock Ex-

change opened the plaintiff refused to take back his stock. He made it plain that a tender would be useless, and therefore a tender was excused—if it had been necessary. As having an equity of redemption in a precarious property, it may have been his duty to seek redemption in a reasonable time.

So, even if the defendant now really owns the stock, even if the sales he speaks of were colourable sales, I do not think the plaintiff could compel him to return that stock.

The result of all that happened is this, that Doucette became entitled to retain the stock and Wills the money, which was very much more than the stock was worth, during all these times that he so flatly declined to take it back again. He cannot blow cold when stocks are low and blow hot when they soar. He would never have dreamed of making any claim for these stocks at the present time, or any other time, if there was not money in it for him. If the stock had remained below \$9.50 and \$9 there never would have been any such claim as this; and, if sued, the plaintiff would be vigorously maintaining his right to the money.

The claim, in my judgment, fails. The plaintiff ceased to be the owner of the stock probably at the latest in December of last year, when the defendant became entitled to it, and both must stand upon the footing which they then took; and tacitly, if not in words, agreed to maintain.

The result is, that the action is dismissed, but it is not a case for costs. The action will be dismissed without costs.

The plaintiff appealed from the judgment of MEREDITH, C.J.C.P.

November 30. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. H. Shaver, for the appellant. The action is in detinue, and for damages for the detention of certain shares of stock. The defendant borrowed the stock, and now refuses to return it. This refusal constitutes a conversion: *Dos Passos on Stock Brokers and Stock Exchanges*, 2nd ed., p. 912. Even if the defendant at one time offered to return the stock, he did not

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make a proper tender. Counsel referred to the judgment of MEREDITH, C.J.C.P., in *Bickell v. Ford and Doucette*.*

No one appeared for the defendant Doucette, the respondent.

*BICKELL V. FORD AND DOUCETTE.

This action was also tried by MEREDITH, C.J.C.P., at Toronto, on the 6th October, 1915.

H. H. Shaver, for the plaintiffs.

W. G. Thurston, K.C., for the defendant Ford.

A. L. Smith, for the defendant Doucette.

MEREDITH, C.J.C.P. (at the conclusion of the hearing):—I accept with confidence the testimony of the witness Ford. In so far as that testimony may conflict with that of the witness Cashman, I accept unhesitatingly Ford's testimony. And, quite apart from that, I would have had no difficulty in finding what the actual facts of this case are in so far as they are material to the judgment which ought to be pronounced between the parties.

It is a case of what has been called during the trial a "loan of stock." The defendant Doucette borrowed from the plaintiffs the stock in question. It was borrowed for thirty days, to be returned in three days after the expiry of the thirty days. Doucette paid \$7,000 to the plaintiffs as security for the return of the stock. Part of the stock has been returned, and part of the money has been returned; otherwise the parties are in this respect as they were at the outset, and their rights are the same.

The defendant Doucette desired to return the stock about the time of the expiry of the thirty days, and endeavoured to do so. The plaintiffs, for their own reasons and their own benefit, refused to accept it, under some sort of pretence that they did not know Randolph, the man through whom the stock was being returned. They were bound to take the stock, and their refusal of it was a mere pretence, a desire to get out of the obligation to take it back in any way they could, fair or unfair.

If the defendant Doucette had stood upon his rights as they existed at that time, this action would fail; but he did not. He chose to let all that go. Why, is not very material, but probably for his own convenience. It is not likely that he would have done it if he had foreseen what is happening to-day. But he did not, and so he lost whatever benefit he might have had from that refusal of the plaintiffs to do that which they ought to have done and which they had contracted to do. And so the matter has gone on ever since, with a great deal of correspondence upon the subject passing between the parties, both of them treating it as an open transaction, as if the plaintiffs were entitled to have their stock returned to them, and the defendant Doucette was entitled to a return of his money.

As they have made their bed they must lie on it. That is to say, the stock not returned belongs to the plaintiffs. The defendant Doucette must return it to them. The money which he paid, that is, the balance of it, must be paid back to him upon such return of the stock. Those are the legal rights as between these parties, the plaintiffs and the defendant Doucette.

In regard to the defendant Ford there is no liability of any character. It may be that, if he had bought as a broker from another broker, in the ordinary way, he would have been personally liable to pay the price, and that would apply to a borrower as well as a purchaser. But that was not this case. From the outset the plaintiffs

December 10. RIDDELL, J.:—The plaintiff, a member of the Standard Stock Exchange, Toronto, had some “Dome Mines” stock: the defendant Ford, another member of the Standard Stock Exchange, wanted some Dome stock and “borrowed” 400 shares on the 8th July, at \$9, and 350 on the 20th July, at \$9.50, i.e., he “borrowed” the shares, putting up in the plaintiff’s hands as security \$3,600 + \$3,325 = \$6,925. Of the 750 shares, 500 have been returned; the plaintiff, alleging that he had demanded the remainder but the defendants refused, brought his action for “a return of the said 250 shares,” an accounting by the defendants of their dealings with the same, and special damages—the defendant Doucette had by an arrangement taken Ford’s place in the contract.

This is apparently a simple action in detinue; a perusal of the evidence, however, shews that “borrowing” in stock-broking circles does not imply a return of the very stock certificates “borrowed;” but that, on such a borrowing, the loan is repaid by the return of stock certificates of the same amount and kind of stock as that borrowed.

knew that another broker, Doucette, was the borrower. Whether or not they might have elected to treat either of these brokers as their debtor is not a matter of concern now, because they did elect to treat Doucette as the person answerable to them, and very reasonably and properly so, because they knew from the outset that Ford had no interest in it, or at the most nothing but his commission upon the transaction, if there were one. Throughout this long correspondence the plaintiffs accepted and treated Doucette as the person answerable to them. There is no excuse that I can see for making Ford a party to this action.

Quite apart from that, the defendant Ford can rest upon the offer to return the stock made at the expiration of the thirty days, because he has not waived, as Doucette has, his right to rely upon that.

Upon the double ground, therefore, I find no excuse for making Ford a party to this action. The action must be dismissed with costs as against him.

The relief which the plaintiffs are entitled to against Doucette is a return of this stock with all that belongs to it—that is to say, the dividend which was declared upon it and the right to subscribe for additional stock at \$10 a share, which came to the owner of this stock whilst it was in Doucette’s possession and control. Upon a transfer of those rights being made, Doucette is entitled to have his money back.

If he does not transfer the stock, then the plaintiffs are entitled to damages for the loss which they will sustain by reason of inability to recover their stock. The defendant Doucette should elect at once whether he will return the stock or not. If he does not return the stock, he must pay damages. The damages will be what the stock can be bought for upon his default, less the balance of the \$7,000 which is still coming to him.

There will be no order as to costs of the action as between these parties.

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On such a borrowing, it is manifest from the evidence, the borrower has the right to return the stock or any part of it at any time and demand the return to him of the amount of money paid by him as security for that stock or an aliquot part thereof.

By a subsequent arrangement, as already said, Doucette was substituted for Ford as the borrower, with all Ford's rights and duties.

At the trial before the learned Chief Justice of the Common Pleas, the action was dismissed as against Doucette, it already having been dismissed against Ford.

The plaintiff now appeals.

The action is on a contract to deliver 250 shares of Dome stock—the defence is in substance, offer by the defendant and refusal by the plaintiff.

It is plain that, so long as the value of the stock so lent is lower than the price at which it is lent, the lender, having the use of the money put up as security, will not be desirous of a return of his loan; but the borrower will be desirous of paying back the stock. That is what took place. Doucette asked the plaintiff several times if he would take up the stock; he said he would when the Exchange opened; the Exchange did open in December, but the stock was not all taken up. On the 2nd February, 1915, Doucette wrote demanding that 200 shares should be taken up, or the "margin" reduced to \$6, i.e., that Wills should pay him the difference in cash between the \$9 or \$9.50, at which the stock was borrowed, and \$6 (200 shares had been taken up at \$9.50 on the 12th December, and another 100 at the same rate.) On the 15th March, 200 shares were taken up at \$9; and no more at any time, but the stock has gone to \$22.

When the stock was low, the plaintiff "was jollying them along;" he wanted "to hold that money naturally as long as" he could—Doucette had the stock and wanted to return it, but the plaintiff would not accept it: accordingly, when the stock came up again to the price at which it was borrowed, the defendant sold it—this was in March or April, 1915.

The performance of the contract of Doucette (or Ford) to deliver to him the stock, the plaintiff prevented, and he can have no damages for the non-delivery. He cannot claim to be

put in a better position that if he had carried out his contract to receive the stock when the other party desired to return it—then he would have had the stock, but he would be obliged to repay the sum of money he had received; and this would be more than—or at least not less than—the value of the stock he would receive. Of course no formal tender is necessary in such a case.

I am of the opinion that the appeal should be dismissed—as no counsel appeared for the respondent, the dismissal will be without costs.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD, J., agreed in the result.

KELLY, J.:—It is manifest from the plaintiff's own admissions that his plan was to retain Doucette's money (for the use of which he paid nothing) so long in any event as the selling value of the 250 shares of Dome Mines stock was less than that money, the stock having declined after Doucette had obtained the loan of it. He says: "I wanted to hold that money, naturally, as long as I could." He was quite positive in his statement to Ford, representing Doucette, that Doucette must not return the shares, and that, if they were sent by the latter to Ford for that purpose, he (plaintiff) would not accept them. He complains not of refusal to return them, but of want of formal tender, a proceeding he himself rendered unnecessary, and so he excused Doucette from going through that formality. He was simply, as he himself puts it, "jollyng" the defendant, retaining his money and preventing him from returning the stock, and thus leaving him to run the risk of loss through the decline in its value. Had the stock not advanced, as it did later on, there is little doubt he would have continued the "jollyng" with the object of holding on to Doucette's money and evading accepting the return of the stock. I am satisfied that the judgment appealed from is correct, and that it should be upheld, for the reasons stated by the learned trial Judge. The plaintiff's "jollyng" scheme is not one to which the Court should give the stamp of its approval.

Appeal dismissed without costs.

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Dec. 10.

BURMAN v. ROSIN.

ROSIN v. BURMAN.

Set-off—"Mutual Debts"—Unconnected Transactions—Judicature Act, sec. 126—Rights of Assignee of one Debt—Assignment of Chose in Action Subject to "Equities"—Conveyancing and Law of Property Act, sec. 49.

A debt of R. to B. and a debt of B. to R. (arising out of unconnected transactions) were both due and payable before the date at which B., for value, assigned to K. his claim against R.; both claims were disputed and were in litigation, and the exact amount due upon either had not been in any way ascertained:—

Held, that this did not prevent these claims being "mutual debts" and as such liable to be set off: Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 126.

The assignee has no greater right than the assignor—where there is the statutory right to set off, the assignee takes a claim against which there is a valid legal defence, which is one of the "equities" to which the right of an assignee of a chose in action is subject: Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 49.

There is another equity, sometimes called "set-off," but not depending upon the statute, which arises when the claims are upon the same contract or are so interwoven by the dealings between the parties that the Court can find that there has been established a mutual credit, or an agreement, express or implied, that the claims should be set one against the other; and this equity also attaches to the claim in the hands of an assignee.

Review of the authorities.

SUMMARY APPLICATION by Burman, upon originating notice, for an order determining a question as to the right to payment out of a sum of \$95 paid into Court.

December 9. The application was heard by MIDDLETON, J., in the Weekly Court at Toronto.

G. T. Walsh, for Burman and Kirkpatrick.

W. M. Mogan, for Rosin.

December 10. MIDDLETON, J.:—Originating notice to determine the right to \$95 now in Court.

The facts are not disputed. Burman sued Rosin for money due under a plumbing contract, and recovered judgment for \$95. Rosin, under another contract, has a judgment against Burman for \$135. These contracts were both completed about March, 1915. On the 31st August, 1915, Burman, for value,

assigned to Kirkpatrick his claim against Rosin, and Kirkpatrick now resists Rosin's claim to set off one demand against the other.

Mr. Walsh contends that there cannot be a set-off to the prejudice of the assignee, because the transactions giving rise to the respective claims were in no way connected, and no right or claim to set off had been asserted before the assignment.

In my view, the claim to set off is entitled to prevail, and there is not any foundation for Mr. Walsh's contention.

Here the debts were both due and payable long before the assignment; both claims were disputed and were in litigation, and the exact amount due upon either had not been in any way ascertained; but this did not prevent these claims being mutual debts and as such liable to be set off.

The statute (Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 126) provides: "Where there are mutual debts between the plaintiff and defendant . . . one debt may be set against the other."

And (by sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109) the right of an assignee of a chose in action is "subject to all equities which would have been entitled to priority over the right of the assignee" under the law in force prior to the Judicature Act.

That the right to set off mutual debts where there would have been set-off in a Common Law Court was such an equity, has never been doubted—though it might well be regarded as a defence to the claim, a defence which would wipe out the claim and cause it to cease to exist as effectually as a release or payment: *Jeffryes v. Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674, 680. In order that there could be such common law set-off, it was at one time thought to be essential that the claim of the defendant seeking set-off should, at the time the plaintiff brought his action, be not only due but payable, but it was finally determined that set-off should be allowed if the claim was due at the date of the writ, even though not payable till a future date—*debitum in presenti, solvendum in futuro*: *Christie v. Taunton Delmard Lane and Co.*, [1893] 2 Ch. 175, 183.

But a right to set-off cannot be maintained as against a plain-

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tiff suing to enforce his demand, or as against an assignee, when the demand which it is sought to set off arises upon an independent contract and is not due at the date of the suit or the assignment—it has not yet become a “debt” so as to be subject to the statute: *Watson v. Mid Wales R.W. Co.* (1867), L.R. 2 C.P. 593.

There is, however, another equity which has sometimes been called “set-off,” but which does not in any way depend upon the statute, which arises when the claims are upon the same contract or are so interwoven by the dealings between the parties that the Court can find that there has been established a mutual credit, or an agreement, express or implied, that the claims should be set one against the other. In all such cases, the defendant can set up against the plaintiff’s demand his claim for an abatement of the plaintiff’s demand—e.g., when the claim is for work done and the services are defective: *Young v. Kitchin* (1878), 3 Ex. D. 127. And this equity will attach to the claim in the hands of an assignee.

It was because there was no such “mutual credit,” “in the sense that the parties have mutually trusted one another to make mutual payments,” from which there could “be implied, or fairly be presumed from the transaction, an agreement, or an understanding amounting to a contract, that the one shall go in liquidation of the other,” and because the transactions were independent, that the right of set-off was denied in *Watson v. Mid Wales R.W. Co.*, *supra*; and because the claims did arise out of the transaction or interwoven transactions that the claims were set off in *Government of Newfoundland v. Newfoundland R.W. Co.* (1888), 13 App. Cas. 199, 213; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160.

Nowhere can there be found any foundation for the suggestion now made that where the debts are past due, and the statute gives the right of set-off, the assignee has any greater right than the assignor. The assignee simply has the same right as the assignor to refuse to set off where the claim is not due at the critical date—the date of the writ in the one case and the date of the assignment in the other—save where the equity which I have endeavoured to describe exists. Where there is the statu-

tory right to set off, the assignee takes a claim against which there is a valid legal defence.

The set-off must be allowed, and the money will be paid to Rosin.

I understand there is an agreement as to costs.

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[APPELLATE DIVISION.]

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BERLINER GRAMOPHONE CO. LIMITED v. POLLOCK.

Dec. 11.

Patent for Invention—Validity—"Life of Patent"—Termination by Non-manufacture and Illegal Importation—Pleading—Action to Restrain Manufacturing or Selling in Breach of Contract—Defence—Amendment—Construction of Contract—Patent Act, R.S.C. 1906, ch. 69, secs. 23, 38 (b).

The life of a patent is, in the absence of special circumstances, "the term limited for the duration:" sec. 23 of the Patent Act, R.S.C. 1906, ch. 69. By an agreement, under seal, made in March, 1910, between the plaintiffs and defendant, the defendant, among other things, agreed not to engage in the manufacture or sale of machines of a described kind in Canada during the life of a certain Canadian patent therefor, granted to S. in 1907, and assigned to the plaintiffs. The plaintiffs, alleging that the defendant was manufacturing and selling machines in violation of this agreement, brought this action for an injunction and other relief. The defendant, by his statement of defence, set up that the agreement was obtained by misrepresentation, that it was void as in restraint of trade, etc.; and an order was made by the Master in Chambers giving the defendant leave to amend by setting up the further defence that the agreement was based on the continuance in effect of the patent, and that the plaintiffs, upon the non-manufacture and non-user of the invention, and, since the making of the agreement, by illegally importing, had surrendered to the public the rights covered by the patent, which was accordingly forfeited:—

Held, reversing the order of BOYD, C., in Chambers, which affirmed the order of the Master, that the mere occurrence of the circumstances set out in the proposed amended defence did not bring the life of the patent to an end within the meaning of the agreement; and, as to the alleged importation, that the patent might be in existence *quoad* any one but the importer: sec. 38 (b).

Semble, that if the patent were declared void by a judgment *in rem* of a Court of competent jurisdiction, the "life" would be considered to have come to an end.

APPEAL by the plaintiff company from an order of BOYD, C., in Chambers, affirming an order of the Master in Chambers, granting leave to the defendant to set up a defence attacking the present validity of the plaintiff company's patent, on the grounds of illegal importation and non-manufacture. The action was

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for an injunction restraining the defendant from manufacturing or selling talking-machines in breach of an agreement.

Leave to appeal was given by an order of MASTEN, J., in Chambers: see 9 O.W.N. 169.

December 1 and 2. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

R. C. H. Cassels, for the appellant company, argued that leave to set up the defence proposed should not have been granted, because, even if the acts of importation and non-manufacture suggested were proven, this would not establish that the "life" of the patent had come to an end, and that therefore the defendant was released from his agreement. The "life" of a patent is "the term limited for the duration:" Patent Act, R.S.C. 1906, ch. 69, sec. 23. If there were importation, this would affect the existence of the patent only so far as the importer was concerned: sec. 38(b). He also submitted that there was no jurisdiction in the Ontario Courts to declare a patent of no effect, referring to secs. 34, 35, 38, and 45 of the Patent Act; *Maw v. Massey-Harris Co.* (1902), 14 Man. R. 252; and *Lefroy on Canada's Federal System*, p. 549.

Casey Wood, for the defendant, respondent, contended that the amended defence should be allowed to be set up, because, on account of the importation, non-manufacture, and non-user proposed to be proved, the "life" of the patent was at an end, and the defendant could be no longer restrained: *Daw v. Eley* (1867), L.R. 3 Eq. 496. He agreed that he would be estopped in regard to an action based upon clauses 11 and 12 of the agreement, and he abandoned his counterclaim.

Cassels, in reply.

December 11. The judgment of the Court was delivered by RIDDELL, J.:—Prior to March, 1910, the defendant had been selling talking-machines which were infringements of the plaintiffs' patent No. 103332, and the plaintiffs sued him for infringement—in March, 1910, the parties entered into an agreement under seal, a copy of which is attached hereto.*

*The agreement was made between the Berliner Gramophone Company Limited, called the "Berliner company," of the first part, and Arthur Bell

The defendant sold all the stock of machines referred to in the agreement, to a company formed by himself, and in which it is said he has a controlling interest; the company then began and it continues to manufacture and to sell disc talking-machines, under the managership of the defendant. The plaintiffs brought

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Pollock, carrying on business under the name of Pollock Manufacturing Company, called "Pollock," of the second part, and was as follows:—

"Whereas the Berliner company has, through the Berliner Gramophone Company of Canada Limited, commenced an action against Pollock based upon the alleged infringement of Canadian patent No. 103332, relating to Tone Arms, and granted to Joseph Sanders on January 29th, 1907, and assigned to the Berliner Gramophone Company of Canada Limited.

"And whereas Pollock has sold talking-machines of the so-called disc type known as the Pollock talking-machine, phonola, etc., which it is admitted by Pollock are infringements of said patent No. 103332.

"And whereas both parties desire to settle and terminate said litigation.

"Now, therefore, for and in consideration of the sum of five dollars mutually paid by each party unto the other, and for other good and valuable consideration, the receipt of all of which is hereby acknowledged by each party, and of the mutual covenants and agreements herein recited, the parties hereto do hereby mutually agree as follows:—

"1. Pollock agrees to forthwith confess judgment in the action above referred to, and hereby acknowledges that the said Joseph Sanders was the first original, true, and sole inventor of the intention set forth and claimed in and by the said Canadian patent No. 103332 aforesaid, and that the said patent is good and valid.

"2. Pollock agrees not to engage, either directly or indirectly, for himself or as agent or employee of any other person, firm, or corporation, in the manufacture or sale of disc talking-machines in Canada during the life of said letters patent No. 103332, with the exception of the sale of his present stock hereinafter referred to.

"3. Pollock agrees that, except to the Berliner company, he will not sell wholesale any machines hereinafter referred to at a lower price than as follows:—

"Eighty dollars for so-called Crown Prince machines;

"Fifty dollars for so-called Princess machines;

"Thirty-two and 50/100 dollars for so-called Duke machines and also for a so-called Table Cabinet machine known as model A.

"4. Pollock also agrees that these prices will only be given to jobbers or distributors who will purchase at least fifty assorted machines of the above-mentioned types.

"5. Pollock further agrees that, with the exception of the jobbers aforesaid, his lowest wholesale prices will be as follows:—

"One hundred dollars for Crown Prince machines;

"Sixty-five dollars for Princess machines;

"And forty dollars for Duke and model A. machines:

"except to dealers whose initial purchase will be at least one thousand dollars, in which case an extra ten per cent. discount may be given.

"6. Pollock further agrees that, at the expiration of two years from the date of this agreement, he will assign to the Berliner company the various industrial designs of the models of the machines he has secured in Canada.

"7. Pollock agrees to pay to the Berliner company as royalties in full for the machines he is licensed for by this contract the sum of three thousand dollars, payments to be made as follows:—

"\$750 within thirty days from the date of this agreement;

"\$750 on or before October 15th, 1910:

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this action claiming an injunction against the defendant manufacturing or selling such machines and for other relief; the defendant claimed that the agreement was obtained by misrepresentation, that it was void as in restraint of trade, etc.

After an examination for discovery of the plaintiffs' officer,

"\$750 on or before April 15th, 1911;

"And \$750 on or before October 15th, 1911.

"8. Pollock further agrees to furnish to the Berliner company, on the first of each and every month, until such time as the stock of machines herein referred to shall be exhausted, a statement of all machines sold by him during the previous month.

"9. The Berliner company hereby licenses Pollock, under all patents owned or controlled by it, to dispose of the said stock of machines held by Pollock, consisting of one thousand three hundred and fifty machines known as Crown Prince, Princess, Duke, and model A., and Pollock agrees that he will not sell any machines from this date other than those licensed herein.

"10. The parties mutually agree with each other that each will pay his own costs to date in the litigation referred to above and its own further costs, if any, incident to the formal determination of said suit.

"11. It is further agreed that the royalties above referred to shall be due only so long as any claim or claims of said patent No. 103332 shall not be declared invalid by a tribunal of competent jurisdiction; but, even in such event, the royalties already paid to the Berliner company shall be the property of the Berliner company, and shall not be returned.

"12. The Berliner company agrees that, if at any time any claim or claims of said patent No. 103332 shall be declared invalid by a tribunal of competent jurisdiction, it will release Pollock from any and all further obligations under this agreement from the time such decisions may be handed down.

"13. Pollock further agrees to give access to any of his books to any authorised representative of the Berliner company at all reasonable times.

"14. The Berliner company agrees not to license other parties than those already licensed by it under patent No. 103332 for the period of two years following the date of this agreement, without the consent of Pollock, except the Bell Piano and Organ Company Limited and a certain Bennett.

"15. Pollock further agrees to place a typewritten label on the under part of the board holding the motor on each and every machine sold by him, said label to have inscribed on it the words 'Licensed under patent No. 103332.'

"16. Pollock agrees not to sell, wholesale to his jobbers, any machines without a contract from them and signed by them to maintain the prices as set forth in this agreement.

"17. The Berliner company agrees to notify its trade that Pollock has obtained a license under its patents, and that it has no further claims against any one with respect to the Pollock product, as the same is lawful henceforth.

"18. The Berliner company agrees that it will not attempt to further collect damages for past infringements with respect to the Pollock product either from Pollock or from any dealers who have purchased machines from Pollock.

"19. In the event of the Berliner company reducing the price of the Cabinet machines which it is now selling, Pollock shall be at liberty to reduce the prices of his own machines in the same proportion."

(Signed and sealed by the parties.)

the defendant obtained an order from the Master in Chambers as follows:—

“1. It is ordered that the defendant be at liberty to amend his statement of defence by alleging that the agreement sued on was based on the continuance in effect of the letters patent number 103332, and that the plaintiff company, upon the non-manufacture and non-user of the said invention, and, since the making of the said agreement, by importing and continuing as it is now doing, protected by the said letters patent, has surrendered to the public the rights covered by said letters patent, and the said letters patent are now forfeited and of no effect, and the plaintiff company should not be permitted to seek to enforce the said agreement; and by counterclaiming for a declaration of the Court that the plaintiff company has forfeited the patent, and that the same is now of no effect.

“2. And it is further ordered that, in the event of the defendant amending his defence and counterclaiming as hereinbefore set out, the plaintiff company may, within ten days thereafter, deliver such reply and defence to counterclaim as it may be advised.

“3. And it is further ordered that Henry S. Berliner, vice-president of the plaintiff company, do attend before Jean Trudell, a special examiner in the city of Montreal, at such time and place in the city of Montreal as he shall in writing appoint, and submit to be examined *vivâ voce* upon oath as an officer of the plaintiff company, touching his knowledge of the matters in question in this action, pursuant to the Rules in that behalf made and provided.

(Paragraphs 4 and 5 of the order are not material.)

The plaintiffs appealed, and their appeal was dismissed by the Chancellor.

Leave was obtained from Mr. Justice Masten to appeal to this Court; and the plaintiffs now appeal.

Upon the argument it was suggested by the Court that the proposed defence might be allowed to be set up, and the examination for discovery postponed until after that issue was disposed of; to this the plaintiffs' counsel assented, but the defendant's counsel did not. It was then suggested that the examination for

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discovery should be confined to such facts and circumstances as might indicate that the wording of the agreement did not bear what would be its ordinary, usual meaning in law in the absence of special facts and circumstances. This the defendant also rejected, and insisted on an interpretation of the contract as it stands—there is no pretence of any fact or circumstances modifying or affecting the meaning of the words employed.

So far as affects the present motion, counsel for the defendant does not contend that his case is advanced by paragraph 12—no doubt wisely, but in any case *quilibet renuntiare potest lege pro se introducto*. He confines his claim to paragraph 2.

“2. Pollock agrees not to engage, either directly or indirectly, for himself or as agent or employee of any other person, firm, or corporation, in the manufacture or sale of disc talking-machines in Canada during the life of said letters patent No. 103332, with the exception of the sale of his present stock hereinafter referred to.”

He claims that, by virtue of the acts of the plaintiffs set out in the proposed amended statement of defence—he abandons his counterclaim—the “life” of the patent has gone, and the time during which he is bound has expired. The result is, that we must now determine what in this agreement is meant by the “life of said letters patent.”

The life of a patent is a very common phrase—my Lord on the hearing referred to a recent instance, *Carrique v. Catts and Hill* (1914), 548, 32 O.L.R. 648, at p. 565—but it does not seem ever to have been judicially interpreted.

I have no doubt that the life of any patent is, in the absence of special circumstances, “the term limited for the duration:” R.S.C. 1906, ch. 69, sec. 23.

I do not think that the mere occurrence of the circumstances set up in the proposed amended defence brings the life of a patent to an end within the meaning of this contract—there might be no discovery of the facts—if such discovery should be made, no one might be sufficiently interested to dispute the continuance of the patent, etc., etc.

Moreover, as to the alleged importation, at least, the patent might be in existence *quoad* any one but the importer: sec. 38(b).

It may well be that, if a judgment *in rem* of a Court of competent jurisdiction were obtained declaring the patent void, the "life" would be considered to have come to an end—but there is nothing of that kind here.

I think the appeal should be allowed with costs throughout.

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[IN CHAMBERS.]

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RE SOVEREEN MITT GLOVE AND ROBE CO. V. CAMERON.

Dec. 11.

Division Courts—Territorial Jurisdiction—Action for Price of Goods—Place of Payment—Place of Delivery—Dispute-note Filed by Defendant—Failure to Appear at Trial—Judgment on Admission—Motion for Prohibition.

The plaintiffs, carrying on business at D., sued the defendant, living at S., for the price of goods shipped to him (at S.) by the plaintiffs (at D.) The action was brought in a Division Court, in the territory of which D. was included. The defendant filed a dispute-note in which he disputed the jurisdiction, admitted that the amount sued for was payable, but alleged a set-off of more than that amount, and also claimed damages for wrongful dismissal. The defendant did not appear at the trial, and judgment was given against him for the amount claimed by the plaintiffs, with interest, and his counterclaim was dismissed:—

Held, that, as the defendant did not attend at the trial, and it did not appear that any injustice would be done by allowing the judgment to stand, the Court ought not to grant a prohibition.

Re Canadian Oil Companies v. McConnell (1912), 27 O.L.R. 549, followed.

Held, also, that the place of payment for the goods was D., where the creditors were—the debtor must seek his creditor; and, even if it could be argued that the delivery was not at D., that was a fact to be determined by the Judge in the Division Court; and not till he found that the delivery was not at D. would his jurisdiction be ousted.

All things giving the cause of action occurred in the local jurisdiction of the forum chosen by the plaintiffs, and it had jurisdiction, though it was foreign to the debtor's residence.

MOTION by the defendant for prohibition to the Fourth Division Court in the County of Norfolk.

December 10. The motion was heard by RIDDELL, J., in Chambers.

C. M. Garvey, for the defendant.

W. H. Irving, for the plaintiffs.

December 11. RIDDELL, J.:—The plaintiffs, a company manufacturing mittens, etc., in Delhi, Ontario, on the 21st May, 1915,

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sued A. E. Cameron, the defendant, in the Fourth Division Court in the County of Norfolk, for \$88.23, being the amount claimed as the balance of the value of goods sold and delivered to him, after crediting him with certain commissions—interest being added, \$5.40, to the net balance, \$82.83.

The defendant lives in Sudbury; he filed a dispute-note in which he (1) disputed the jurisdiction, (2) admitted the \$82.83 as payable, but (3) alleged a set-off of \$132.25, and (4) claimed damages for wrongful dismissal, \$65. The result is that (omitting for the time being to consider the objection to the jurisdiction) the defendant took upon himself to prove (a) an excess of set-off and (b) breach of contract.

He did not appear at the trial; on the admission in the dispute-note, of course, judgment went against him, and interest was awarded, as it justly should be—while it is said that his counterclaim was dismissed. Since that time he has brought an action in Sudbury on his counterclaim, but with that I have nothing to do on this motion—the defendants there must plead *res adjudicata* or (and) otherwise as they are advised.

What I have to deal with, is the motion of the defendant for prohibition to the Delhi Court.

The admitted facts are that the defendant entered into a contract with the plaintiffs, dated at Delhi, whereby he agreed to become selling agent for them in Northern Ontario, receiving a commission of 8 per cent.; that he received quantities of goods from the plaintiffs; that, instead of receiving cash at all times, “the usual practice was for” him “to order sufficient goods to cover” his “commission account;” and, “a short time previous to” his “dismissal,” he “had ordered and received an amount of goods;” and that it is the goods which he had ordered, for the value of which this action is brought.

The judgment complained of was rendered on the 21st July; the affidavit for prohibition sworn on the 25th November; notice of motion served on the 26th November; no application has been made to the County Court Judge, and no explanation given of the delay.

A Court by whose judgment I am bound has recently said:

"Where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, the Court ought not to grant a prohibition:" *per* Middleton, J., in *Re Canadian Oil Companies v. McConnell* (1912), 27 O.L.R. 549, at pp. 550, 551.

So far as concerns the claim of the plaintiffs, the defendant's own admission shews that the amount was payable; as to the counterclaim, that was brought into the Court by the defendant himself, and he is himself to blame if his own act injures him—in any case, the Court had jurisdiction to try the claim.

But, even if the *Canadian Oil Companies* case did not bind me, the only reason advanced by the defendant is, that the payment for the goods was to be made in Sudbury; it is undoubted law that the place of payment is where the creditor is—"the debtor must seek his creditor," and not *vice versa*.

There can be no doubt that all the elements giving the cause of action must have occurred in the local jurisdiction of a Court foreign to the debtor's residence: *Re Doolittle v. Electrical Maintenance and Construction Co.* (1902), 3 O.L.R. 460; *Re Taylor v. Reid* (1906), 13 O.L.R. 205. Here this was so.

Even if it could be argued that the delivery was not at Delhi, that was a fact to be determined by the trial Judge; and not till he found that the delivery was not in Delhi would his jurisdiction be ousted.

It is argued that the contract of agency was actually signed at Sudbury and not at Delhi—this is emphatically denied, but it is wholly immaterial where that contract was signed—it is not sued upon; the contract actually sued upon is the implied contract to pay for goods sold and delivered.

Having arrived at the conclusion that the motion cannot succeed, I do not consider whether it should be entertained at all.

The motion will be dismissed with costs.

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[IN CHAMBERS.]

Dec. 11.

SHAW V. UNION TRUST CO. LIMITED.

Discovery—Examination of Officer of Defendant Company—Status of Shareholder as Plaintiff—Pleading—Companies—Breaches of Contract—Complaint of Minority Shareholders—Acts of Majority—Ultra Vires or Fraudulent Acts—Scope of Discovery—Right of Action—Motion to Commit—Practice—Forum.

Whatever the state of the pleadings, questions put upon the examination for discovery of a party, or the officer of a corporation-party, concerning any matter which cannot give, directly or indirectly, separately or in conjunction with something else, a cause of action or a defence to an action, must be disallowed; and, though the question might more satisfactorily come up in another way, a defendant, or the officer of a defendant corporation, may, upon examination for discovery, by declining to answer, raise the objection that the plaintiff has no right to sue at all, and therefore has no right to discovery.

Rogers v. Lambert (1890), 24 Q.B.D. 573, applied and followed.

Where an officer of a corporation-party has declined to answer questions asserted to be proper, the correct practice is for the examining party to move to commit the officer or for a writ of attachment; and while, if it be desired actually to commit the recalcitrant, the motion should be made in Court, it may be in Chambers if all that is desired be an adjudication upon the propriety of the refusal.

Where, in an action by a shareholder of a contracting company, on behalf of himself and all shareholders except the defendants, against a trust company, a securities company, certain individual shareholders, and the contracting company, the real complaint was based upon an alleged breach by the trust company and the securities company of contracts with the contracting company, and the statement of claim sufficiently alleged that the plaintiff and those whom he represented were minority shareholders and the offending companies majority shareholders, it was *held*, that the facts alleged were sufficient to bring the acts of the defendants as shareholders of the contracting company within the rule which requires that the acts complained of shall be of a fraudulent character or beyond the powers of the company; and the officer of the trust company, on examination for discovery, was compellable to answer questions based upon the allegations of the statement of claim.

Burland v. Earle, [1902] A.C. 83, 93, followed.

MOTION by the plaintiff for an order for the committal of the defendant J. M. McWhinney for contempt of Court in refusing (upon the advice of counsel) to answer certain questions upon his examination for discovery as an officer of the defendants the Union Trust Company Limited.

December 10. The motion was heard by RIDDELL, J., in Chambers.

E. B. Ryckman, K.C., for the plaintiff.

G. H. Watson, K.C., and *W. B. Raymond*, for the defendants.

December 11. RIDDELL, J.:—An action is brought by Leslie M. Shaw, on behalf of himself and all other shareholders of the Blake Contracting Company other than the defendants, against the Union Trust Company Limited, the Financial Securities Company of Canada Limited, J. M. McWhinney, W. Murray Alexander, C. R. Cumberland, A. J. Glazebrook, and the Blake Contracting Company. In the statement of claim it is set out that the Blake Contracting Company had a contract with the Richmond and Henrico Railway Company of Virginia to build a railway in that State; that it had entered into a contract with Burton et al., a firm of railway contractors in Richmond, Virginia, for that firm to build the road. The Union Trust Company and the Blake Contracting Company then entered into negotiations which resulted in a written contract between the Blake Contracting Company and “the Financial Securities Company (acting therein for and on behalf of and in the interest of the trust company)” —whatever that may mean. Under that contract, the Blake Contracting Company agreed to build the road, repay with interest to the Financial Securities Company any advance made by that company, assign to the Financial Securities Company all moneys, etc., payable to the Blake Contracting Company under its contracts; that, subject to an option to Kleinwort & Co., of London, England, the bonds which were to be issued by the railway company might be sold by the securities company or the trust company and applied on the advances; that the directors, etc., of the securities company were to be given a majority representation on the directorate of the Blake Contracting Company until repayment of advances; that an issue of bonds to the amount of \$2,500,000 would be made by the railway company, and its stock increased to \$1,250,000, the Union Trust Company to be trustee of the bond issue, etc.

The securities company agreed to supply sufficient money to complete the enterprise, not to exceed \$500,000; and it was agreed that the railway bonds and stock should be held by the trust company as security for the repayment of the advances, etc., for sale, etc., at the request of the securities company (the Blake Contracting Company to assist in every way); accounts should be kept by the trust company; the right to vote on the

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railway stock and on "the said stock in the contracting company" to be in a nominee of the securities company, that company to have the right to inspect the work done and being done, etc., and to stop advances in case of default in finishing the road, etc., and to take possession of the work—with other provisions more or less usual, but of no consequence on this inquiry.

The statement of claim proceeds to set out that the contracting company transferred the money, the right to stock, bonds, etc., a majority of stock in the contracting company, "to the trust company and to the securities company," elected directors of these companies to its own board so as to be the majority, the trust company was appointed trustee as agreed, "the trust company and the securities company" were put in control of the construction of the railway, etc., and "so became trustees for the plaintiff and the other shareholders of the contracting company." It then is alleged that the trust company and the securities company well knew that the contract was "understood and agreed" to be "predicated wholly upon the said written contracts," etc.

Then it is claimed that the trust company and the securities company (a) procured the cancellation of the Burton contract, (b) cancelled an agreement with Kleinwort & Co. for an advantageous sale of the bonds of the railway company, (c) neglected to sell the bonds, (d) undertook the construction of the railway on their own account and at increased expense, (e) got an extension of time for building the road, (f) and in these acts used the control they had obtained on the board of the contracting company—they built a railway, etc., at the cost of \$1,200,000, instead of a maximum of \$625,000, and the trust company sold the undertaking for \$700,000, for default under the bond mortgage.

The individual defendants are charged with personal misconduct and acting as mere agents of the offending companies. "The shareholders of the contracting company who transferred their shares in trust to the trust company and to the securities company and their nominees have demanded" the retransfer of their shares, but been refused; the plaintiff owns 300 shares of \$100 each out of a capital stock of 1,000 shares; the two

offending companies have failed to comply with the laws of New York State, under which the contracting company is incorporated—the trust company has no authority under its charter to do any of the acts complained of.

The prayer is: (1) for damages for breach of trust; (2) and for breaches of contract; (3) an injunction; (4) another injunction; (5) a third; (6) and a fourth; (7) an account by the two companies.

The trust company in its statement of defence denies everything, asserts that the statement of claim discloses no cause of action, says the plaintiff has no status to sue, denies that it is a trustee for the shareholders, says it made no contract with them, denies control of the securities company or that it acted as shareholder of the contracting company, etc., etc.

An appointment was taken out for the examination of Mr. McWhinney “as an officer of the Union Trust Company;” upon the examination, the following took place:—

After rather formal questions and answers, from which it appeared that Mr. McWhinney was general manager of the Union Trust Company, and had been for two or three months only a director of the Financial Securities Company, his counsel took objection in these words:—

“Mr. Raymond: I am going to object now to the question we have now reached, a question which relates to issues raised in this action; the other questions were formal, but I am going to object to this question and any other questions which take the witness into the issues which the plaintiff has raised herein; my objection to this question and any similar questions will be that the plaintiff has no status—bringing this action as a shareholder only—has no status to bring the action in this form, and has no status to inquire into the issues he has raised here; the objection has already been taken in the statement of defence, paragraphs 2 and 3, I think; this objection is not taken at all with any intention to delay merely, but is a *bonâ fide* objection, taken to raise the question whether these issues can be properly inquired into in such an action as this; this is perhaps the most convenient time to raise it, and have it judicially determined.

“Mr. Ryckman: I maintain that, upon the statement of claim,

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and the transactions that were done and which took place by the Union Trust Company with the Blake Contracting Company and the Richmond and Henrico Railway Company, and with the promoters of the project at Richmond, and with the Financial Securities Company of Canada Limited, a party defendant, the relations and actions and inter-actions of the Union Trust Company with these different parties is the basis of our action, and such questions must of necessity be answered.

“Ruling: Mr. Ryckman is entitled to inquire into the relations between the two companies in connection with this matter.

“13. Q. Do I understand, Mr. McWhinney, that, as an officer of the Union Trust Company, you decline to answer, on the advice of counsel, any questions with relation to the relations between your company and the Financial Securities Company of Canada Limited? A. I do.

“14. Q. You know your company, in its statement of defence, has denied the allegations of the plaintiff respecting the relations between your company and the Financial Securities Company—do you decline to answer questions that are based upon these denials contained in your own statement of defence?

“Mr. Raymond: On advice of counsel, he declines to answer questions going into the questions raised in your pleadings.”

A motion is now made to commit Mr. McWhinney for a contempt of Court or for a writ of attachment, etc.

This is the correct practice where an officer of a corporation has declined to answer questions asserted to be proper: *Badge-row v. Grand Trunk R.W. Co.* (1889), 13 P.R. 132; *Central Press Association v. American Press Association* (1890), 13 P.R. 353; *McWilliams v. Dickson Co. of Peterborough* (1905), 10 O.L.R. 639: and while, if it be desired actually to commit the recalcitrant, the motion should be in Court (*Merchants Bank v. Pierson* (1879), 8 P.R. 123), it may well be in Chambers if all that is desired be an adjudication upon the propriety of the refusal—and this is the usual case and the usual practice. (If there is, and I think there is not, an irregularity in the practice, Mr. Watson most properly abandons all technical objections.)

The real foundation for the refusal to answer is sufficiently

set out in the position taken by counsel at the examination, which was also taken on this motion, viz., that the plaintiff has no right to sue at all, and therefore has no right to discovery.

It is not a convenient way to bring up such an important question thus, but I cannot hold that it is altogether improper; and, if it must now be determined, no harm will be done, although it might have more satisfactorily come up in another form.

The case of *Rogers v. Lambert* (1890), 24 Q.B.D. 573, decides that, whatever the state of the pleadings, the party is not allowed to compel answers to his questions which can be of no avail to advance his legal position. There, in an action for wrongful detention of goods by a bailee, he set up in his statement of defence the *jus tertii*; the defence was not moved against; he delivered interrogatories aimed at procuring admissions of facts which would not form a valid defence even if true: Charles, J., allowed the interrogatories, but his decision was reversed by a Divisional Court, Denman and Wills, JJ.; Denman, J., at p. 575, says: "Assuming these facts to be true . . . they would afford no defence." Wills, J., says, p. 577: "The defence, therefore, to which the interrogatories are directed, even assuming it were sufficiently raised upon the pleadings, would be no defence in law; and the interrogatories consequently, not being relevant to any matter which would afford a good defence to the action, must be disallowed."

I can see no difference between a defence and a claim—and think any questions concerning any matter which could not give, directly or indirectly, separately or in conjunction with something else, a cause of action, must be disallowed.

This is the same principle as the disallowance of examination upon matters which are alleged in the statement of claim, but can give a cause of action, etc., only if some other fact be first established—such cases as *Evans v. Jaffray* (1902), 3 O.L.R. 327, *Bedell v. Ryckman* (1903), 5 O.L.R. 670, etc., are on that principle. See also *Parker v. Wells* (1881), 18 Ch. D. 477 (C.A.); *Fennessy v. Clark* (1887), 37 Ch. D. 184; *Tasmanian Main Line R.W. Co. v. Clark* (1879), 27 W.R. 677; *Whyte v. Ahrens* (1884), 26 Ch. D. 717, 721 (C.A.); *Barham v. Lord Hunting-*

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field, [1913] 2 K.B. 193; *Hennessy v. Wright* (1888), 24 Q.B.D. 445, 448(n.); *Dawson v. Dover and County Chronicle Limited* (1913), 108 L.T.R. 481, at p. 484, and cases cited.

It is therefore necessary to find out precisely what the claim is and upon what it is founded.

While there are several more or less vague suggestions of direct dealing between the offending companies, it is perfectly manifest that the real complaint is based upon an alleged breach by these companies of an agreement or agreements with the contracting company. The contracts were with the contracting company, the damages, if any, were those of the contracting company—not at all of the shareholders. The shareholders as such are as distinct entities from the company as they are from each other; and, unless there are peculiar facts, they cannot sue for damages to the company or upon a contract with the company.

The statement of claim sufficiently alleges that the plaintiff and those whom he represents are minority shareholders and that the offending companies are majority shareholders—in that case the plaintiff can sue only if the majority are shewn to have acted *ultra vires* the company or in fraud. “The cases in which the minority can maintain . . . an action are . . . confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company:” *per* Lord Davey in *Burland v. Earle*, [1902] A.C. 83, at p. 93. The learned Privy Councillor goes on to say: “A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company. . . .”

The facts alleged are sufficient to bring the acts of the defendants as shareholders of the contracting company within the rule. See also *Exeter and Crediton R.W. Co. v. Buller* (1847), 5 Ry. Cas. 211; *Normandy v. Ind Coope & Co.*, [1908] 1 Ch. 84; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56. This last case decides that if, when the action began, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders, the minority might begin

an action without an attempt to have the company approve of it. "An action in this form is far preferable to an action in the name of the company and then a fight as to the right to use its name." Many cases will be found mentioned in Palmer's Company Precedents, 11th ed., pp. 1359 *sqq.*

The objection, therefore, to answer questions, in the broad form in which it is made, cannot be sustained.

I make no ruling as to the propriety of any particular question: if any question be objected to, the examiner will rule, and another application may be made to the Court.

The order will be that Mr. McWhinney will attend at his own expense and answer all proper questions then put to him—he will also pay the costs of this application forthwith.

It may perhaps be that the Court will not compel answers to certain questions until the relationships of the two companies to each other and to the contracting company and (or) the plaintiff are established; but with that I have nothing to do—no such ground was urged at the examination or before me.

I may say that I am not at all impressed with the argument that the stand taken by counsel for the trust company was well based upon a supposed delicacy in the reputation of such a company, which would be fatally damaged by a breath and disappear like the bloom upon the peach. It seems to me that an honourable company, honestly conducted as I suppose this is, would be eager to let all the light possible into its dealings so as to shew the perfect propriety of its conduct—their is nothing like sunlight to kill the microbes of suspicion.

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Dec. 13.

[BOYD, C.]

EXCELSIOR MINING CO. v. LOCHHEAD.

Assessment and Taxes—Tax Sale—Assessment Act, 1904, 4 Edw. VII. ch. 23 (O.)—Clerk's Return—Assessor's Return—Basis for Sale—Unoccupied Land—Sec. 122—Advertising—Time of Sale—Sec. 144—Inadequacy of Price—Sale Openly and Fairly Conducted—Duty of Treasurer to Inquire as to Value of Land—Sec. 142—Notice to Redeem—Address of Owner not Furnished—Sec. 165—Curative Provisions—Effect of secs. 172, 173—Sale not Attacked within two Years—Period Computed from Date of Sale.

In an action commenced on the 12th October, 1915, to set aside a sale made to the defendant on the 7th November, 1912, of the plaintiffs' land, for the unpaid taxes of 1909, and to set aside the deed executed on the 11th December, 1913, in pursuance of the sale, it was held:—

- (1) That the land was properly described as "not occupied" in the return of the township Clerk to the Treasurer, dated the 20th July, 1912, of lands liable to be sold, and that return was based on the Assessor's return under oath to the Clerk. This return, not displaced by superior evidence, formed a sufficient basis for the sale of the land: sec. 122 of the Assessment Act, 4 Edw. VII. ch. 23 (O.)
- (2) That the statute was substantially complied with in regard to advertising the sale, but sec. 144, which provides that the day of the sale "shall be more than 91 days after the first publication of the list in the Ontario Gazette," was not literally followed.
- (3) That in tax sales the Court does not interfere on the ground of inadequacy of price; and, apart from values, the sale was fairly and openly conducted; the law does not cast any duty on the municipal officer who sells to inquire into or form any opinion of the value of the land, before selling (sec. 142).
- (4) That the plaintiffs, being non-resident and not having notified the Treasurer of an address to which notices might be sent, could not complain because a notice sent to them on the 10th November, 1913, that the land, if not redeemed in a month, would be conveyed to the purchaser (sec. 165), did not reach them.
- (5) That, by force of sec. 172, notwithstanding any neglect, omission, or error, whether in respect of imposing the tax or in any subsequent proceeding prior to the deed, the right of action was barred.
- (6) That the two years allowed by sec. 173 for bringing an action are to be computed from the day of sale, not from the date of the deed; and that section is applicable for the protection of the purchaser.

Donovan v. Hogan (1888), 15 A.R. 432, distinguished by reason of a change in the wording of the statute.

Burrows v. Campbell (1912), 23 O.W.R. 271, 4 O.W.N. 249, approved and followed.

ACTION to set aside a sale to the defendant of the plaintiffs' land (lot 10 in the 9th concession of Loughborough) for taxes in arrear.

The action was tried by BOYD, C., without a jury, at Kingston.

A. B. Cunningham, for the plaintiffs.

J. L. Whiting, K.C., for the defendant.

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December 13. BOYD, C.:—The validity of the tax sale and deed is to be considered as under the Assessment Act of 1904 (4 Edw. VII. ch. 23, Ontario). The plaintiffs purchased the surface rights in lot No. 10 in the 9th concession of Loughborough from one McNaughton, in February, 1909. The mining rights were acquired (probably) later, in 1910, from one Mace, through the co-operation of one Williams, who was assessed for the land in 1909. The taxes were not paid, and this default occasioned the sale now impeached.

Some mining work for mica had been done on the land, but these operations ceased in 1910. It is a wild, rough country, difficult of access, and the particular lot (200 acres) lay vacant, unfenced and unoccupied.

There is strange confusion in the evidence and in the papers of the municipal officers as to the buildings. There were buildings in connection with the mining camp: boarding-house, stable, sheds, and store; and the assessment is \$250 for land and \$250 for buildings, and this is carried on to 1912 in some of the papers. But I have no doubt that the whole resulted from a mistaken conception of the site of the buildings from a distant inspection by the Assessors and Collectors. None of these seems to have been on the lot, and the man most conversant with the premises, who has known the place for a number of years, and has lived all his life within two miles of it, on Kronk Lake, says that the buildings were not on this lot. One of the final documents preliminary to the sale, i.e., the Clerk's return under the corporate seal to the Treasurer, dated the 20th July, 1912, of lands liable to be sold, contains this lot as one "not occupied," and that was based on the Assessor's return under oath to the Clerk. This return is made of evidential force by the statute (sec. 122); and, if not displaced by superior evidence, forms a sufficient basis for the sale of the lands. And none such has been offered by the plaintiff.

The point is, however, taken that the officers were acting on obsolete forms, applicable under the superseded law in R.S.O.

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1887, ch. 193, sec. 141; and that appears in the form of an official letter from the Treasurer to the Clerk, transmitting the list of lands liable to be sold (exhibit 19).

The one point of difference between the earlier and later statutes is, that the Act of 1904 requires the Assessor to ascertain whether any of the lots are "built upon," as well as "occupied" or "incorrectly described;" and, according to his observation, he is to enter in the proper columns, "occupied or built upon and parties notified," or "not occupied," or "incorrectly described."

The return in this case describes the lot as "not occupied;" and the plaintiffs' contention is, that the lot should have been described as "built upon," and that notice should have been sent to the owners, and the item for taxes of 1909 included in the current tax-bill for 1912. This claim rests upon the question of fact whether the lands were "built upon," and I think the weight of evidence is against that contention. The only thing approaching a structure was an old derrick attached to the soil, formerly used in mining; but, after the cessation of work, the derrick remained as a mere derelict, worth less than \$5. It was a fixture, no doubt, but it did not amount to a building.

Another objection is as to the advertising and time of sale. The Treasurer advertised first in the Ontario Gazette on the 10th August, and three times after that, i.e., four weeks in all; and the sale was advertised in the Kingston "Standard" for 13 weeks beginning the 8th August. The sale was on the 7th November, 1912. According to the statute (sec. 144), the day of the sale "shall be more than 91 days after the first publication of the list in the Ontario Gazette." Counting from the 8th August, the 91 days would be up on the 9th November, a Saturday; and to be strictly regular the earliest day would have been Monday the 11th November. Counting from the first publication in the "Standard" on the 8th August, the 91 days would end on the 7th November, and that would have been sufficient under the Act of 1887, by which the 91 days are after the first publication of the list (sec. 166). The substantial part of the statute, calling for an advertisement for 13 weeks (91 days),

was complied with, but there was an error in not allowing for the delay in publishing in the Gazette, which appears only on Saturday.

The next objection is that the sale was carried on in an unfair and unconscionable manner, whereby lands worth at least \$1,000 were sold for \$18.62. The discrepancy is not really so great—as farming lands the lot would bring \$200 or \$300—in a mining aspect the price would be a guess. But, granting a considerable discrepancy between value and sale price, what follows? In tax sales the Court does not interfere on the ground of inadequacy of price: *Henry v. Burness* (1860), 8 Gr. 345, 350; *Borell v. Dann* (1843), 2 Hare 440, at pp. 450, 451.

Apart from values, I do not find it proved that the sale was other than fairly and openly conducted. The evidence is, that there was an audience of 12 or 15 people, and that it was conducted in the usual way, and to the mind and eye of the Treasurer there was no evidence of collusion. No doubt, the acquisition of the whole lot for the taxes was what is called a “bonanza” for the purchaser; but that is what the persons who frequent these forced sales go for. The purchaser knew no more of the lot than did the Treasurer—the former bought at a venture—and the law does not cast any duty on the officer who sells before the sale to inquire into or form any opinion of the value of the land (sec. 142). This statutory provision displaces what was said by Spragge, V.-C., in *Henry v. Burness*, 8 Gr. at p. 357. See also *per* Lennox, J., in *Errikkila v. McGovern* (1912), 27 O.L.R. 498, at p. 501.

Earlier Canadian decisions, based on the theory that a duty lay upon the Treasurer to inform himself as to the value and condition of the land before selling, led to the expression of doubt as to whether the sale of a whole lot for a small amount of taxes could be accounted a fair sale. Hence we find Esten, V.-C., saying in *Schofield v. Dickenson* (1863), 10 Gr. 226, 229: “It may . . . be questioned whether the Sheriff would, in any case, be justified in allowing the whole lot or piece of land, charged with the taxes, to go for a very small part of the value in the first instance without an effort, by reserving the lot, or adjourning the sale, to protect the interests of the owner: or in

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allowing a sale to proceed in the face of a determination manifested by the audience to act in a manner inconsistent with a proper sale, as where they evince a fixed resolution to purchase none but whole lots, especially where it arises in some degree from uncertainty as to the value, it being the duty of the Sheriff, as it appears, to make himself acquainted with the value of the property."

The same idea appears in the judgment of Patterson, J.A., in *Donovan v. Hogan* (1888), 15 A.R. 432, 447, where he says: "It is a misnomer to speak of a fair sale when neither the man who sells nor the man who buys knows anything of the article sold." And again (also at p. 447): "What is aimed at is that these [tax] sales shall be conducted as ordinary business transactions are where property is sold by auction with a view to obtain its fair market value."

The test to be applied is not that of obtaining the fair market value as upon an ordinary business transaction, but how much may be expected upon an enforced sale by a public official. The statute does not speak of a fair sale, but of a "sale fairly and properly conducted." It is so conducted when it has been properly advertised, when a sufficient number of bidders attend to satisfy the judgment of the officer, reasonably exercised, when every one has an equal chance, and when, there being no evidence of collusion or pre-concerted action in the audience, the highest bid or the only bid prevails: *Eagleton v. East India Co.* (1802), 2 B. & P. 55; *Metropolitan Street R. Co. v. Walsh* (1906), 94 S.W. Repr. 860. None such has been imputed in this case—the whole *gravamen* of the attack is an inadequate price. And I find no case in which that has been *per se* in a tax sale held to be sufficient to nullify the sale. See *per* Lord Eldon in *White v. Damon* (1802), 7 Ves. 30, at p. 35. Different considerations apply when the land sold is well known and when it is not easily accessible. These things are to be regarded by the Treasurer in selling.

The Collector's return in April, 1910, shews this lot assessed to A. J. Williams and classed as "vacant land" in annexed affidavit and returned as in arrear for the taxes of 1909, with "no property to distrain" (sec. 113).

The Treasurer's list of lands, dated the 1st February, 1912, shews the lot as liable to be sold in 1912.

The Clerk's return thereto I have referred to as shewing this lot "not occupied." Thereupon the Warden issued his warrant, 5th August, 1912, directing the sale, and the lot was sold on the 7th November to the defendant.

On the 10th November, 1913, a notice was sent by the Treasurer in a letter addressed to "Excelsior Mica Mining Company Limited, Toronto," which was returned marked "not found—not asked for." This was a notice that the land, if not redeemed in a month, would be conveyed to the purchaser (sec. 165). The Treasurer searched the register and got such address of the owner as he could therefrom, and sent the notice aforesaid, and also one to a registered incumbrancer, which was also returned. It is not shewn that the plaintiffs had given any notice of the correct address of the corporation, or that the municipal authorities had or knew of any other local designation beyond "Toronto." The sale was completed without any notice coming home to the plaintiffs as to the state of the arrears and the impending tax-deed.

The machinery of taxation moves; and if a non-resident owner does not avail himself of the simple means afforded by the statute of lodging his proper address where all notices may be sent by the municipal officers, he can only blame himself if disaster ensues. The municipality cannot protect an owner more than he cares to protect himself in this regard; and indeed legislation has developed to validate the outcome of taxation in tax sales as against a dilatory or negligent land-owner. And this brings up the defence pleaded under secs. 172 and 173.

The sale was on the 7th November, 1912; the deed was dated the 11th December, 1913; and the writ was issued on the 12th October, 1915. More than two years had elapsed after the sale, and less than two years after the deed, before the transaction was questioned in the Court.

Section 172 gives a conditional bar to any litigation to set aside the deed if the taxes have been three years in arrear (as here), and if the land is not redeemed, and provided that the sale was openly and fairly conducted. Granted these conditions,

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the sale and the official deed shall be final and binding upon the former owner—and this, according to the sweeping language introduced by the legislation of 1904, “notwithstanding any neglect, omission or error of the municipality or any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto.” The section, 172, repeats the earlier language, that the intent of the Act is that the owner shall be required to pay the taxes within three years after they are in arrear, and in default (using a new iteration of the result) “the right to bring an action to set aside the said deed or to recover the said land shall be barred.” (Cf. sec. 172 with R.S.O. 1897, ch. 224, sec. 308.)

All the defects pointed out or proved in this case fall under one or the other head of neglect, error, or omission, whether it be in respect of imposing the tax or in any subsequent proceeding prior to the deed. These words cure defects which prevailed in earlier decisions, and indicate the intention of the Legislature to give more stability to tax sale deeds. This has been touched upon by Meredith, C.J., in *Blakey v. Smith* (1910), 20 O.L.R. 279, at p. 283.

Donovan v. Hogan, 15 A.R. 432 (1888), expounds the original form of sec. 173. It stands substantially thus in the R.S.O. 1887: “Whenever lands are sold for arrears of taxes and the Treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding . . . if the same has not been questioned . . . by some person interested . . . within two years from the time of sale:” ch. 193, sec. 189. That decision was, that the two years counted from the giving of the deed, and not from the time of the sale; or, in other words, that *sale* meant conveyance or *deed*. Before this decision, I had held the contrary in several cases, thinking that such a result savoured more of legislation than of exposition: *Dalziel v. Mallory* (1888), 17 O.R. 80, 94.

In 1904, the section was amended, and reads: “Wherever land is sold for taxes and a tax deed thereof has been executed, *the sale and the tax deeds* shall be valid and binding . . . unless questioned before some Court of competent jurisdiction within two years from the time of sale.” This plain language

seems to render it impossible for a Court of construction to say that the final word "sale" means deed or conveyance—renders it impossible to say that the last use of "sale" is different from the first use of it in the section, where the *sale* is contrasted with and set down as distinct from the tax *deed*. Emphasis is thereby laid on the importance of the sale in measuring the lapse of time as against the view of the Court of Appeal that emphasis was to be laid on the deed. The same emphasis was laid on the sale in the original of sec. 172 before the amendment of both sections in 1904.

The Privy Council regards the certificate of sale as the emphatic point under which the purchaser becomes the effective owner upon failure to redeem within the statutory period, and as a consequence he is absolutely entitled to a conveyance of the land thereafter: *McConnell v. Beatty*, [1908] A.C. 82.

As was pointed out also by Mr. Whiting, the Privy Council, as to curative Acts respecting sales of lands for taxes, lays it down that the statute should, when the words permit, be construed so as to effect that purpose and attain that object—which is not exactly the trend of prior provincial decisions: *Toronto Corporation v. Russell*, [1908] A.C. 493, 501. The rule in the *Russell* case on this head has been applied in *Cartwright v. City of Toronto* (1913), 29 O.L.R. 73, 76, affirmed (1914), 50 S.C.R. 215; and see judgment of Duff, J., in *Temple v. North Vancouver* (1914), 6 W.W.R. 70, at p. 103.

In this case, where the sale was openly and fairly conducted, with the arrearage of taxes for three years, and the land was not redeemed within a year from the sale, such sale was final and binding, as was the official deed afterwards granted. Under sec. 173 the bar is absolute against recovering, as I read the law, in regard to sale and deed, within two years from the date of the sale. My conclusion is that both sections apply for the protection of the purchaser against the plaintiffs.

The effect of the legislative amendment of sec. 173 was before my brother Falconbridge in *Burrows v. Campbell* (November, 1912), 23 O.W.R. 271, 4 O.W.N. 249, in whose opinion I concur, that the effect of the change was to remove the founda-

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tion of *Donovan v. Hogan*. My brother Riddell, in *Sutherland v. Sutherland* (June, 1912), 3 O.W.N. 1368, declined to consider the effect of the amended section, and thought it should be left to an appellate Court to consider the case in appeal. But it seems to me that the change in the law leaves it open for the Judge of first instance to decide for himself what it means.

The matter came before the Appellate Division in *Errikkila v. McGovern*, 27 O.L.R. 498 (October-December, 1912), upon appeal from Lennox, J., but only incidentally, as the decision rested on the interpretation of a private validating Act. Lennox, J., was of opinion that "sale" in the private Act should be construed by the light of *Donovan v. Hogan*. Riddell, J., quotes the recent cases I have cited, and thinks it inexpedient to say more than to point out the divergent opinions. Such appears to be the state of judicial opinion on the statute in question. I do not regard *Donovan v. Hogan* as binding upon me, owing to the change in the statute. And the way is clear, in my opinion, to decide against the plaintiffs.

The action is dismissed with costs.

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Dec. 17.

DAVEY v. CHRISTOFF.

Landlord and Tenant—Lease of Theatre with Furniture and Equipment—Surrender of Lease—Acceptance—Refusal of Lessee to Transfer License—Damages—Retention of Sum Deposited by Lessee as Security—Rent of Premises—Inadequacy of Heating—Implied Stipulation—Fitness for Habitation—Damages for Breach—Deceit—Counterclaim.

The artificial rule that in the letting of furnished houses and apartments an undertaking is implied on the part of the lessor that they are reasonably fit for the purpose of habitation (*Smith v. Marrable* (1843), 11 M. & W. 5), applies where furnished premises are demised with the primary and principal purpose that they are to be at once used for human occupation.

If this case—that of the lease of part of a building and its contents as a theatre, where it turned out that the heating plant was insufficient to heat the building adequately—did not come within the above rule, it came within the broader principle of a necessary implication, enunciated in *Brymer v. Thompson* (1915), 34 O.L.R. 194, 543; *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488.

The lessee having gone into possession and occupied the premises, the implied undertaking that they should be fit for habitation was treated as a warranty, and the lessee held entitled to recover damages for the

breach. The defect in the heating plant in fact existed from the date of the lease, though the lessee was not aware of it until later, when the weather became cold.

It was also *held*, that there had been an accepted surrender of the lease; and the claims of the lessee to recover a sum deposited with the lessors as security and for damages for deceit, and the counterclaim of the lessors for damages for breaches of the obligations and covenants contained in the lease, were denied.

The lessors were *held* entitled to recover damages from the lessee for his refusal to transfer the theatre license after the surrender.

ACTION by the lessee of a moving picture theatre against the lessors for the return of \$400 deposited as security, for damages for breach of covenants, and for damages for deceit. Counterclaim for damages for breach of covenants.

The action and counterclaim were tried by MASTEN, J., without a jury, at Toronto.

J. W. Payne, for the plaintiff.

W. A. Henderson, for the defendants.

December 17. MASTEN, J.:—The plaintiff in October, 1914, became a sub-lessee from the defendants of a moving picture show and of the premises and equipment theretofore used by the defendants in connection therewith. The premises were known as "The Temple," and were situate at 1032 Queen street west, Toronto. The freehold in these premises belonged to a man named Vogan. The picture show was conducted on the ground floor, and occupied a space of 30 by 105 feet. On the next floor above was situate a billiard-hall, conducted by a man named McNichol, and the upper flat was occupied as apartments by a woman named Mrs. Murray.

The lease is dated the 8th October, 1914, and is in a somewhat extraordinary form. It is executed on a printed form of "farm lease," on which, in the space usually devoted to filling in the names of the parties, there is typewritten the following: "C. K. & B. Christoff and Robert F. Davey do hereby and agree to lease the Moving Picture Show known as the Temple, 1032 Queen St. W., for the term of two years from the twelfth of October, one thousand nine hundred and fourteen, at a monthly rental of \$200.00 two hundred dollars to be paid in advance. It is understood that the lessor leaves the whole con-

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tents, including three hundred and eighty-seven seats more or less, piano, machines, and all other necessary equipment for the operation of the theatre. The lessee agrees to leave the same in good order and will replace anything carelessly broken during his term of rental. It is also understood that he will keep the building other flats above heated at his own expense. All expenses for hired help, electric current and other necessary claims will be paid by the lessee after the date he had taken possession. Further in consideration of the sum of four hundred dollars be deposited as a covenant for two months' rent in advance. It is further understood that the lessee will pay licenses when they come due. It is further understood between the both parties concerned that the four hundred dollars deposited will be applied to the last two months as rent they occupy the premises. It is further agreed that they will have extension of lease at the same rental if the lessee so desire."

The blanks in the printed form have not been filled up in any way whatever, and many of the provisoes are wholly inapplicable to such premises. For example: the lessee covenants that he will "carefully protect and preserve all orchard, fruit, shade, and ornamental trees on said premises from waste, injury, or destruction, and will carefully prune and care for all such trees as often as they may require it, and will not suffer or permit any horses, cattle, or sheep to have access to the orchard on said premises." So far as the covenants and provisoes are applicable, I think they bind the parties. The lease is signed by both parties at the foot.

Under this lease the plaintiff went into possession on the 12th October, 1914. At the time he so went into possession, the undertaking forming the subject-matter of the lease was a going concern, which had up to that date been conducted by the defendants as a moving picture show, and from the time of taking possession the plaintiff continued to operate it in the same way until and inclusive of the 7th January, 1915.

At the time when the lease was made, the defendants Christoff were the owners of the seats, piano, and machines, which were in the theatre, and these were leased along with the premises to the plaintiff, the whole undertaking being in fact leased

to the plaintiff as a going concern, and by the terms of the lease it was specially stipulated that the plaintiff, in addition to paying the rental of \$200 per month, should, at his own expense, heat the two upper flats as well as his own premises by means of a hot water boiler and equipment, which formed part of the demised premises.

The plaintiff's claim arising out of these transactions is threefold:—

(1) He claims that he was wrongfully ejected from the premises by the defendants, and claims to be entitled to a return of the \$400 put up by him as security and referred to in the lease above-quoted.

(2) He claims that during the currency of the lease there was a breach of a covenant, express or implied. The express covenant set up is the covenant for quiet enjoyment (which was very faintly urged), also the proviso in the lease that the lessor is to leave "all other necessary equipment for the operation of the theatre." The implied covenant is that, the theatre having been handed over as a going concern, there is an implied covenant or obligation on the part of the lessor that it shall be fit for operation as a moving picture theatre; and the plaintiff claims that the furnace was insufficient, that it was impossible to heat the theatre properly; and that, consequently, there was a breach of the covenant that it was fit for operation as a moving picture theatre.

(3) He claims damages for deceit, based upon alleged false representations made to him by the defendants at the time when the lease was entered into.

By their counterclaim the defendants allege that the plaintiff wrongfully abandoned the premises, and committed a breach of the obligations contained in the lease, and they claim the sum of \$1,000 for breach of the covenant to pay rental, and for not carrying on the business according to the terms agreed upon under the lease in question.

I deal first with the occurrences which took place in January, 1915, when the lease came to an end.

I am of opinion and find as a matter of fact, upon the evidence, that there was an unequivocal intention on the part of

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both the plaintiff and defendants to surrender the lease in question, and that such intention was in part carried out by delivery of the key by the lessee (plaintiff) to the lessors (defendants) and the acceptance of the key by the lessors.

In the 9th paragraph of the statement of defence, the defendants deny that they wrongfully entered the premises and retook possession, and allege that the "said premises were handed over voluntarily by the said plaintiff to the said defendants at the suggestion of the plaintiff, after demand for payment of rental due to the defendants."

The plaintiff, on the other hand, alleges by his statement of claim that the defendants wrongfully re-entered the said premises and retook possession and ousted the plaintiff therefrom.

There is some difference between the evidence of the plaintiff and that of the defendants as to what actually took place, but it is undisputed that the last performance which the plaintiff gave in the theatre was on the 7th January, 1915. It is also common ground that in the end, either on the 8th January, or on Monday the 11th January, the plaintiff received the key. There is a difference in the account given of the exact circumstances under which the key was handed over, but I think it makes little difference which of the two accounts is accepted.

The fact was that an instalment of rent fell due on the 12th December, payable in advance, and that the same was not paid by the defendants, either then or at any time afterwards. It is plain upon the evidence, also, that the defendants had been from the time the rent fell due demanding payment of the same.

The lease contains in its printed portion the usual condition, "proviso for re-entry by the said lessor on non-payment of rent," and, under the terms of the statute, the instalment of rent falling due on the 12th December not having been paid for 15 days thereafter, the lessors were entitled to take possession and to forfeit the lease. Meantime, between the 12th December and the 1st January, the owner, Vogan, had been installing a new furnace, which, it was hoped, might adequately heat the premises, it being conceded on all hands that the fur-

nace which had been in the place was insufficient for the purpose. The defendants swear that on the 4th January they again demanded payment of the rent, and the plaintiff asked them to let him have another week, saying that, if he was unable to pay them the rent, he would give up possession.

The plaintiff does not admit this conversation, and his account is considerably different. But, upon the whole testimony, I believe that a conversation of this general character did take place on some occasion, and that, while the plaintiff was throughout claiming that he was entitled to apply the \$400 held as security by the defendants on account of the rent then due, he yet agreed in the end to give up possession and to surrender the lease, and handed over the key with that intention, took out any fixtures which he himself possessed, vacated the premises, and the defendants took possession of them.

I find that this was done with the intention which I have first set out, and that the lease was effectively surrendered.

I also find that this surrender was a surrender of the undertaking as a going concern, and as it had been received and carried on by the plaintiff, and included not merely the building, but everything connected with the undertaking, including the provincial license, which had been originally issued to the defendants, and transferred on the records of the Department to the plaintiff on the 10th December (see exhibit 3).

It is clear that this surrender took place at the latest on the 11th January, 1915; and, had the plaintiff fairly carried out the terms of the surrender by assigning the license, as well as handing over possession, I should have held that the plaintiff was entitled to a return of \$200, portion of the \$400 put up as security. But the plaintiff did not hand over the license, and, when the defendants re-opened the theatre and carried it on for two days, the plaintiff notified them that they must desist from so doing, because the license stood in his—the plaintiff's—name. Thereupon the defendants attended the plaintiff with Mrs. Murray to get a transfer of the license, which was, I think, wrongfully refused by the plaintiff.

I think that this action was a breach of the terms of sur-

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render, and I assess the damages in respect of it at the sum of \$200.

With respect to the plaintiff's contention that he had the right to require that the sum of \$400, referred to in the lease as put up for security, should be applied upon the month's rent which had fallen due, I am of opinion that he possessed no such right. The \$400 was put up as security to be applied at the discretion of the lessors in payment of rent in case of default by the lessee, and in case of no default, at the discretion of the lessee, to be applied to the last two months of the term. The lessee had no discretion to apply it to any earlier instalment of rent. The lessors were, therefore, entitled on the 8th January to their remedy by requiring in the first place payment of the month's rent which fell due on the 12th December, and, in default of payment, possession; and I am of opinion that the plaintiff acceded to the demand of possession so made by the defendants, and that there was in truth and effect a valid surrender in law of the lease.

It would be valueless to refer to the numerous and somewhat conflicting cases relative to surrender of leases, and I only notice in that connection (1) that the defendants possessed the legal right to resume possession; (2) that the plaintiff did not resist the giving up of possession, but on the contrary acceded to it by delivering the key; (3) that the defendants took and accepted the key; (4) that the defendants took actual possession of the premises and used it as a moving picture show for two days, and subsequently dealt with the premises in a manner inconsistent with any right of the plaintiff to resume possession; (5) that the plaintiff has never sought at any time to resume possession or to be restored to his rights as lessee. I refer as being most in point to the case of *Phené v. Popplewell* (1862), 12 C.B. N.S. 334, recently applied in *Gold v. Ross* (1903), 10 B.C.R. 80.

The above findings dispose of the claim of the plaintiff for return of the \$400 put up by him as security. The defendants are entitled to retain that sum, for the reasons hereinbefore mentioned. It also disposes of the defendants' counterclaim for \$1,000, the result of the surrender being, so far as the defen-

dants were concerned, that they were not entitled to damages nor to any rental accruing due after the completion of the surrender.

I now come to deal with the plaintiff's claim that the premises were not fitted for operation as a moving picture show during the winter season, owing to the inadequacy of the heating arrangements, that there was a covenant, express or implied, between the parties, that the premises should be so fitted, and that the plaintiff is entitled to damages for breach of such covenant.

The legal obligation so put forward is based by the plaintiff on the following contentions: (1) that the whole substratum of the contract was the taking over by the plaintiff from the defendants of a going concern, to be continuously operated during the succeeding winter; (2) that, in the negotiations for the lease, the plaintiff, on learning of the requirement that he should heat the whole building, checked the negotiations until he received the defendants' assurance that during the previous winter they, the defendants, had burned only three tons of coal per month, which sufficed to heat the building; (3) that in the lease itself provision is made that the defendants shall "leave all other necessary equipment for the operation of the theatre."

I am of opinion that the second contention cannot be maintained, because I think the statement as to heating made by the defendants, whether it was in the terms contended for by the plaintiff or in the terms contended for by the defendants themselves, was not intended by the parties as a warranty.

The third contention cannot be maintained, because the words relied on and quoted from the lease relate manifestly to the equipment (seats and so forth) which belonged to the defendants. The furnace complained of did not belong to the defendants, but was the property of Vogan, the owner of the freehold. But I think that both the second and third contentions strengthen and assist the conclusion that the first contention, above mentioned, is well founded. Adopting the words of Lord Esher, M.R., in *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, I think that, on considering the terms of the contract and the surrounding circumstances in a reasonable and business

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manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

This is fortified by the fact that the question of the heating formed the subject-matter of consideration in the progress of the negotiations, and that the terms of the lease, and particularly the clause relied on by the plaintiff, indicate clearly that the whole undertaking was to be turned over in a fit state for continuous operation.

Whether or not the heating plant was adequate was a fact regarding which the intending tenant was ignorant, while the lessors had occupied the premises during the preceding winter, and knew their condition.

It is plain that it was in the contemplation of both parties when negotiating that the leased premises should continue to be used for the purpose of a moving picture theatre, not only during the current month of October, but throughout the succeeding winter.

I find as a fact that the basis of the contractual relation between the parties was that the premises should be reasonably fit for the purpose of carrying on a moving picture theatre, and that, as part of such fitness, the heating plant, forming part of the leased premises, should be adequate to heat them in a reasonable manner.

I find that the heating plant on the premises was inadequate for this purpose; that, in consequence, the theatre became excessively cold after about the middle of November; and that the plaintiff suffered damage.

The question is whether, on these findings, the plaintiff's claim comes within the rule established in *Smith v. Marrable* (1843), 11 M. & W. 5, and confirmed in *Wilson v. Finch-Hatton* (1877), 2 Ex. D. 336, viz., that "in the letting of furnished houses and apartments an undertaking is implied on the part of the lessor that they are reasonably fit for the purpose of habitation."

The rule has been adopted and applied in the Courts of Canada: see *Macleod v. Harbottle* (1913), 11 D.L.R. 126; *Miles v. Constable* (1914), 6 O.W.N. 362; *Gordon v. Goodwin* (1910), 20 O.L.R. 327.

It appears to be an artificial rule, as distinguished from a general principle, and the persistent disinclination of the Courts to extend it is evidenced by such cases as *Carstairs v. Taylor* (1871), L.R. 6 Ex. 217; *Blake v. Woolf*, [1898] 2 Q.B. 426; and *Robertson v. Amazon Tug and Lighterage Co.* (1881), 7 Q.B.D. 598.

Upon the best consideration that I can give the matter, I think the rule applies where furnished premises are demised with the primary and principal purpose that they are to be at once used for human occupation. If so, the present demise comes within, not only the spirit, but the letter, of the rule. But, if this case does not come within the technical rule above mentioned, it certainly comes within the broader principle enunciated in the cases quoted by Middleton, J., in *Brymer v. Thompson* (1915), 34 O.L.R. 194, at p. 196, applied by him in that case, and confirmed in the Court of Appeal, 34 O.L.R. 543.

The understanding formed in the first place a condition the breach of which would have entitled the lessee to rescission, but, the lessee having gone into possession and occupied the premises, it may be treated also as a warranty, and the tenant can recover damages for the breach: *Harrison v. Malet* (1886), 3 Times L.R. 58; *Charsley v. Jones* (1889), 53 J.P. 280; nor does it, in my opinion, matter that the difficulty did not obtrude itself on the attention of the plaintiff until cold weather arrived in November. The defect did in fact equally exist from the 8th October, when the lease was made. The heating plant was then defective and deficient, as it had been all the previous winter. The conclusion is, therefore, not affected by the decision in *Maclean v. Currie* (1884), Cab. & El. 361, that the implied condition applies only to the state of the house at the commencement of the term, and that there is no implication as to its continuance.

The question, therefore, remains, what damages the plaintiff is entitled to recover. During the first four weeks the weekly receipts averaged \$131, and during the succeeding eight weeks they averaged \$59 a week, shewing in that way a depreciation of \$72 per week, or, for the eight weeks, \$576. It is impossible to estimate how much of this is attributable to the heating and

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how much to other causes; but, estimating the matter as best I can upon the evidence, I think that justice will be done by assessing the damages for breach of the implied covenant at \$350.

With respect to the plaintiff's claim for damages for deceit based upon alleged false representations made to him by the defendants at the time when the lease was entered into, particulars of which are set forth in paragraph 3 of the statement of claim, I do not find any sufficient evidence of a statement by the defendants that they had done business in the premises during the previous year at the rate of \$150 per week. There is evidence to the effect that they stated that there had been a net profit during the preceding year of \$1,000. That statement, however, appears to have been made, not in connection with the negotiations for the lease in question, but rather in connection with an attempt to sell the property to the plaintiff; and, I think, the better evidence is, that the negotiations respecting the sale took place after the lease had been completed, and after the plaintiff was in possession as lessee. I am, therefore, unable to find that the allegation with reference to the amount of profits affords any basis for an action of deceit.

With reference to the claim for deceit based on an alleged false representation that three tons of coal would adequately heat the premises, it is only necessary to say that the evidence does not, to my mind, establish a sufficient basis for holding in the plaintiff's favour. The negotiations were oral, and the statements made are not clearly established. One of the defendants claims to have said that he told the plaintiff that he, the defendant, burned during the preceding winter three tons of coal per month.

No evidence is given of how much the plaintiff did burn; nor is it possible to conjecture whether the plaintiff was induced by the defendants' statements to conclude the negotiations.

I find this issue against the plaintiff.

In the result, there will be judgment for the plaintiff for \$350, with costs.

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MCBRIDE V. IRESON.

Dec. 20.

Landlord and Tenant—Action for Rent—Dispute as to Length of Term—Evidence—Finding of Fact of Trial Judge—Reversal on Appeal—Surrender—Acceptance—Evidence—Intention.

The finding of the trial Judge upon a question of fact was reversed, where it appeared clear to the appellate Court that he had entirely overlooked two pieces of evidence given by witnesses whose testimony he had credited, and that, had they received due consideration, the result would have been different.

The rule stated in the decision of a Divisional Court of the High Court in *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, approved.

It was *held*, upon the evidence, that the defendant was the tenant of the plaintiff for the term of six months.

Held, also, that the plaintiff had not, by receiving the key of the demised premises, putting up a "to let" notice, etc., accepted a surrender of the lease. Such acts are not conclusive—the intention must be looked at.

Mickleborough v. Strathy (1911), 23 O.L.R. 33, referred to.

Judgment of DENTON, Jun. Co. C.J., York, reversed.

APPEAL by the plaintiff from the judgment of DENTON, Jun. Co. C. J., dismissing without costs an action, brought in the County Court of the County of York, by a mesne tenant against his subtenant, to recover a sum of money alleged to be due for rent.

The dispute between the parties was as to the period of the defendant's subtenancy, the plaintiff asserting that it was for six months, and the defendant that it was from month to month.

December 15 and 16. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. M. Mowat, K.C., for the appellant, argued that the learned trial Judge must have overlooked certain evidence given by Greey and Archer, both accredited witnesses, which corroborated the testimony of the plaintiff regarding a "bonus" to be paid by the defendant. This fact should entitle the plaintiff to judgment: *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502. He also contended that the notice to quit which had been given by the defendant was insufficient: *Page v. More* (1850), 15 Q.B. 684. There has been no surrender of the premises. The acts relied upon by the defendant to prove surrender, such as putting up a "to let" notice, etc., were not inconsistent with

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the continuance of the defendant's tenancy: *Mickleborough v. Strathy* (1911), 23 O.L.R. 33; *Oastler v. Henderson* (1877), 2 Q.B.D. 575; *Smith v. Blackmore* (1885), 1 Times L.R. 267.

S. W. Burns, for the defendant, respondent, urged that the learned trial Judge had considered and given due weight to all the evidence. He also contended that the notice given by the defendant was ample: *Foa's Relationship of Landlord and Tenant*, 5th ed., pp. 594, 609; 24 Cyc. 1336; and that the plaintiff had waived any insufficiency in it; also that the evidence proved that there had been a surrender of the term by the defendant.

Mowat, in reply.

December 20. The judgment of the Court was delivered by RIDDELL, J.:—This is an action for rent brought by a mesne tenant against his subtenant—at the trial, before His Honour Judge Denton, the action was dismissed without costs; and, the plaintiff now appeals.

Denuded of irrelevant detail, the facts of the case are few and devoid of complication.

The plaintiff, being about to rent a large building in Toronto from Mr. Greey, entered into negotiations with the defendant to let to him three storeys of it. He contends that it was agreed that the defendant should become his tenant for six months certain; the defendant contends that his tenancy was from month to month.

The learned County Court Judge does not discredit either party, but on the whole case he is "unable to find as a fact that the defendant at any time actually obligated himself to take the premises for six months."

On an appeal of this kind the duty of an appellate Court is correctly stated in *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 502, in part thus (p. 506): "If it appears from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are

erroneous, it becomes the plain duty of the Court to reverse these findings.”

The County Court Judge has accredited the witnesses Greey and Archer, but thinks that their evidence is not helpful—as it seems to me, the evidence of Greey and Archer is conclusive.

The admitted facts are that both parties expected the defendant to become the plaintiff's tenant, and that the plaintiff was endeavouring to get terms from Greey and the defendant which would justify him in taking a lease from Greey; the defendant was willing to pay a certain amount, but not more, as rent—this was not sufficient to answer the plaintiff's purpose. Now the stories of the two parties begin to differ—the plaintiff says that the defendant, while declining to pay any further amount explicitly as rent, agreed to pay \$100 as a “bonus,” which would be the same in effect as paying an increased rent. The defendant's story is that the \$100 was to be paid—that it was to be paid is admitted—towards the expense of a stairway. Mr. Greey swears that the whole expense of the stairway would not be \$50, and he is expressly accredited by the trial Judge.

Mr. Archer says that the defendant said he would give the \$100 “as a bonus,” and Mr. Archer is expressly accredited.

I think it obvious that these two pieces of evidence were entirely overlooked, and that, had they received due consideration, the result would have been different.

Under the rule in *Beal v. Michigan Central R.R. Co.*, it seems to me our clear duty to allow this appeal.

The claim here is for the balance of the six months' rent; and, unless there is something in the conduct of the plaintiff which bars him of his right, judgment should go for the full amount.

The defendant gave a notice to quit, on the assumption that he was a tenant from month to month; and he asserts that his landlord took possession.

The facts are that, when the defendant claimed that his tenancy was at an end, the plaintiff wrote him as follows: “As you returned the key and otherwise expressed yourself not wishing to occupy the premises, also did not pay rent on the 1st of March as agreed, I have instructed Mr. Greey to go ahead and get a

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tenant for the three floors or all of the building; and, if he can get one, I would move on a month's notice; and, if he can rent same, will only ask you to pay rent up to when he gets the other tenant, but expect the rent from you until such a time as he gets one.''. No objection was made by the defendant; Mr. Greey put up a placard in the premises advertising them for rent, etc.

Such acts as receiving the key, putting up an advertisement for rental, etc., etc., are not necessarily an acceptance of the premises by way of surrender—it depends on the intention. Most of the cases are considered in *Mickleborough v. Strathy*, 23 O.L.R. 33, and need not be here repeated.

It is abundantly clear that all that was done by or for the plaintiff in connection with the premises was in effect to endeavour to obtain another tenant—if such tenant could be obtained, the attempted surrender of the defendant would be accepted and effective at that moment, but not till then.

Had a different conclusion been arrived at, it would have been necessary to consider whether the plaintiff was not entitled to at least one month's rent. As at present advised, I think the notice fatally defective, and I should not follow the Missouri case, *Drey v. Doyle* (1887), 28 Mo. App. 249—but this need not be pursued.

The appeal should be allowed and judgment, entered for \$730, interest from the teste of the writ, and costs of this appeal and in the Court below.

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Dec. 21.

Municipal Corporations—Regulation of Petty Traders—Transient Traders By-law of Town—Information for Offence against—Farmer Selling his own Produce—Municipal Act, R.S.O. 1914, ch. 192, sec. 420, cls. 6, 7—“Trader”—“Other Persons”—“Trading Persons.”

The legislation in this Province as to the regulation of petty traders has been of uniform character from the earliest statute in 1816 (56 Geo. III. ch. 36) to its latest development in the Municipal Act, R.S.O. 1914, ch. 192; and the enactments as to hawkers, pedlars, and transient traders are *in pari materiâ*.

History, object, and scope of the legislation.

Attorney-General v. Tongue (1823), 12 Price 51, 60, 61, followed.

Throughout the whole course of legislation as to petty traders, exemption is made in express terms as to commodities which are the growth or produce of the Province; and the exemption extends to the dealings of persons who might otherwise be called temporary traders.

The words “other persons” in sec. 420, clauses 6 and 7, of the Municipal Act, R.S.O. 1914, ch. 192, mean other *trading* persons; and a farmer selling his own produce is not a trader.

A charge against a farmer of selling his own produce in a town, from a railway car by which it had been transported thither, contrary to a transient traders by-law of the town, which followed the wording of sec. 420, was *held* to have been properly dismissed by the Police Magistrate for the town.

CASE stated by the Police Magistrate in and for the Town of Cobalt, in the District of Temiskaming, as follows:—

“On the 27th September, 1915, F. W. Geddes, of Grimsby, Ontario, was charged before me, for that he, on the 9th day of September, 1915, at the town of Cobalt, being a transient trader or other person, did unlawfully, his name not having been duly entered on the assessment roll of the municipality of the town of Cobalt, in respect of income or business or business assessment for the then current year, offer goods or merchandise for sale, without having paid the required license fee before commencing such trade in the municipality of the town of Cobalt.

“Evidence was offered by the prosecution by filing by-law No. 130 of the town of Cobalt, which follows the wording of R.S.O. 1914, ch. 192, sec. 420, clauses 6 and 7, and a certified copy of which is hereto annexed and is part of this case, and the following facts were admitted by the defence and accepted by the prosecution.

“That Mr. Geddes was a fruit and produce producer in the

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Province of Ontario; that the goods or merchandise sold were grown and produced in the Province of Ontario by Mr. Geddes. He consigned the car, from which the produce was sold in Cobalt, to a Mr. McAulay, his agent, with written authority from him to sell the contents. The actual selling was done by a Mr. Sheridan, in the pay of Mr. McAulay. The car on the day in question was stationed on the tracks of the Temiskaming and Northern Ontario Railway, in the town of Cobalt, and the fruit and produce were sold to all comers. It was admitted also that Mr. Geddes was never a resident of the town of Cobalt, and was not entered on the assessment roll of the said town for any purpose, and that he had no license from the town of Cobalt as a transient trader under the said by-law 130.

“The prosecution contended that the words ‘transient traders and other persons’ meant any one who sold anything in the manner in which Mr. Geddes was selling, that is, from the car. Mr. Geddes did not, on the admission, hawk or peddle or sell goods by going from house to house or to other men’s houses on foot, or with any animal, vehicle, boat, vessel or other craft, bearing or drawing goods, wares, or merchandise for sale, or otherwise carrying goods, wares or merchandise for sale, as described in R.S.O. 1914, ch. 192, sec. 416, clause 1. He or his agent stood in his car on the track, and the purchasers came to him. The prosecution admitted that, if Mr. Geddes had taken his goods and drawn them and peddled them from house to house as aforesaid, since these goods were the growth, produce, or manufacture of Ontario, he would not have to take out a hawker’s license; but, since he did not peddle his goods in the manner indicated, but from a stationary car, it was contended that he would have to take out a transient trader’s license, under by-law No. 130, from the town of Cobalt before he could sell.

“The defendant contended that, under sec. 416 of the Municipal Act, as aforesaid, and its clauses, he did not require to take out a license, since he was the producer of the goods, and since he was selling them through some one authorised in writing to sell them.

“I held that the whole question rested on the point whether Mr. Geddes was a trader within the meaning of by-law 130.

“In Halsbury’s Laws of England, vol. 27, p. 509, the meaning of the words ‘trade’ and ‘business’ are defined as: “‘Trade’ in its primary meaning is the exchanging of goods for goods or goods for money; and in a secondary meaning it is any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned professions and from agriculture. The word, however, is one of very general application, and must always be considered with the context with which it is used. Thus, under the Sunday Observance Act, 1677, a solicitor, or a farmer, or a barber, or a coach proprietor, is not a tradesman, but a horse-dealer is; and, as used in various Revenue Acts, the word “trade” is not limited to buying and selling, but may include manufacture.’

“Under the heading ‘Trading on Sunday,’ in Holmest’s Sunday Law in Canada, p. 93, it is stated that a farmer was held not to be within 29 Car. II. ch. 7, sec. 1: *Regina v. Cleworth* (1864), 4 B. & S. 927. Under the Municipal Act, sec. 401, clauses 1 to 5, urban municipalities have power to pass by-laws to regulate selling on the streets, etc. By clause 5 (a) they have not the power to prevent a farmer from selling at shops and stores at any time.

“Section 416 of the Municipal Act gives power to municipalities to regulate hawkers, etc., but it also expressly prevents a municipality from exacting a license fee from a farmer who grows his own produce in the Province of Ontario, and who wishes to hawk or peddle the produce of his farm. I held from this that the Legislature never regarded a farmer as a hawker.

“I thought that the words ‘other persons’ in sec. 420 of the Municipal Act, clauses 6 and 7, should be construed as meaning ‘transient traders and other trading persons.’ I thought the rule of *ejusdem generis* applied. I found that Geddes was a person engaged in selling the produce of his own farm, the said produce being grown in the Province of Ontario—in other words, he is a farmer, and not a trader or trading person, within the meaning of the by-law; and I dismissed the case.

“On the above undisputed facts, the question I respectfully submit for the opinion of this Honourable Court is:—

“Was I right, as a matter of law, in dismissing the case?”

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By-law No. 130 of the town of Cobalt, being a by-law to regulate and govern transient traders, was as follows:—

“1. Transient traders and other persons whose names have not been duly entered on the assessment roll of the municipality of the town of Cobalt, in respect of income or business assessment for the then current year, and who may offer goods or merchandise of any description for sale by auction or in any other manner conducted by themselves or by a licensed auctioneer or otherwise, or who are not entered upon the assessment roll, or who may be entered for the first time upon the assessment roll of such municipality, in respect of income or business assessment, and who may offer goods or merchandise of any description for sale by auction, or in any other manner, conducted by themselves or by a licensed auctioneer, or by their agent, or otherwise, shall pay a license fee before commencing such trade in the municipality of the town of Cobalt.

“2. The fee payable for such license shall be \$150.

“3. This by-law shall not affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed of within the municipality of the town of Cobalt at any time, if the insolvent carried on his business with such stock within the district of Nipissing at the time of the issue of an attachment or of the execution of an assignment.

“4. This by-law shall not affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed of within the municipality of the town of Cobalt, if the insolvent had carried on business therewith in the said municipality at the time of the issue of an attachment or of the execution of an assignment.

“5. The words ‘transient traders,’ wherever they may occur in this by-law, shall extend to and include any person commencing, in the municipality of the town of Cobalt, the business in the above clause mentioned, who has not resided continuously in such municipality for a period of at least three months next preceding the time of the commencement by him of such business therein.

“6. Provided always that any sum so paid for such license shall be credited to the trader paying the same upon and on

account of taxes for the unexpired portion of the then current year, as well as any subsequent taxes, should such trader remain in the municipality a sufficient time for taxes to become due and payable by him, and in any other event the said sum so paid for such license shall be taken and used by the municipality as a portion of the license fund of the said municipality.

"7. By-laws No. 6 and No. 115 are hereby repealed.

"8. Provided that, in case of breach of any of the provisions of this by-law, any person committing such breach shall be liable to a fine or penalty not exceeding \$50 exclusive of costs, and in case of non-payment of the fine inflicted for such breach, and there being no distress out of which such fine can be levied, such person committing such breach shall be liable to imprisonment either in the common gaol for the district of Nipissing or the lock-up for the town of Cobalt, with or without hard labour, for any period not exceeding twenty-one days, unless in any of the said cases the fine inflicted, with costs, if any, including the costs of the distress and of the committal and conveyance of the offender to the said gaol or lock-up, are sooner paid, and every such fine or penalty may be recovered and enforced with costs according to the provisions of section 704 of the Consolidated Municipal Act, 1903."

(Passed on the 3rd October, 1910.)

December 15. The case was heard by BOYD, C., in the Weekly Court at Toronto.

W. J. Tremear, for the prosecutor.

H. E. Rose, K.C., for the defendant.

December 21. BOYD, C.:—This is a case stated by the Police Magistrate at Cobalt to determine whether in law he was right in dismissing the case. The application was to impose a fine on the defendant because he had transgressed the provisions of the transient traders clause of the Municipal Act.

The defendant was a farmer, fruit and produce producer, living at Grimsby, who had his products transmitted by railway car to Cobalt, and there had the fruit raised by himself (said to be apples) sold from the car, on the track of the railway company, to all comers.

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The argument was, that the farmer *pro hac vice* was acting as a "transient trader" who came from a distance with his fruit; and, though he might have hawked it about from door to door, he had no right to station himself and sell at one spot, which, though not selling by auction, was selling in a manner repugnant to the particular clause of the Act as to this class of vendors: R.S.O. 1914, ch. 192, sec. 420, clause 6.

The legislation in this Province as to the regulation of petty traders has been of uniform character from the earliest statute in 1816 to its latest development in the Revised Statute of Ontario of 1914. The phraseology has been transcribed from English legislation of like kind; and the object of both has been, as defined by Graham B., in 1823, "to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there, for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury; and, on the other, to guard the public from the impositions practised by such persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." *Attorney-General v. Tongue* (1823), 12 Price 51, 60.

The first Act was of provincial scope, imposing, for the benefit of the Crown, duties of excise upon this class of trading persons; and much of its essential language is reproduced in subsequent legislation. The Act extended to "every hawker, pedlar or petty chapman, and every trading person . . . going from town to town, or to other men's houses, or travelling on foot, or with a horse or horses . . . or other beasts bearing or drawing burthen, boat or boats, decked vessel or other craft, or carrying to sell or exposing to sale, any goods, wares or merchandise within this Province:" 56 Geo. III. ch. 36, preamble.

This Act was repealed upon the introduction of municipal government, and the right to collect license fees was vested in the municipal authorities in 1853 by the statute of Canada 16 Vict. ch. 184. By sec. 2, power was given to regulate and govern "hawkers and petty chapmen, and other trading per-

sons going from place to place or to other men's houses, or who have not become householders by permanent residence in any town or place within such county or city, or travelling, either on foot or with a horse . . . or other beast . . . bearing or drawing burthen . . . within such county or city carrying to sell . . . any goods, wares or merchandise." This legislation was directed against the homeless or vagrant dealers, as well as those having no permanent residence in the locality.

No distinction was made in the cases between the mere foot-peddler and the hawker with his beast of burden and the outsider who came into the locality without a license, as to the manner in which the goods are disposed of. That is, the sale might be from a stationary point as well as upon an ambulatory progress. Thus, in the case cited, the defendant lived at Birmingham, and sent over to Shrewsbury a quantity of goods, enough to stock a temporary shop which he opened there, and disposed of the goods by auction: *Attorney-General v. Tongue*, 12 Price at p. 61; *Attorney-General v. Woolhouse* (1827), 1 Y. & J. 463; *Manson v. Hope* (1862), 2 B. & S. 498.

The law appears under the head of "Hawkers and Pedlars" in C.S.U.C. 1859, 22 Vict. ch. 54, sec. 284 (3). This section is repeated in the Municipal Institutions Act (U.C.) in 1866, 29 & 30 Vict. ch. 51, sec. 286 (3), where, so far as I can learn, for the first time, appears a new development relating to "transient traders." This is found, oddly enough, at the end of some sections headed "Drainage," sec. 296 (56), and it reads: "For licensing . . . transient traders and other persons who occupy places of business in the city or town for uncertain periods less than one year, and whose names have not been duly entered in the assessment rolls for the then current year."

In the French version of the statute, in the clause relating to "hawkers and pedlars," those words are rendered by the words "Colporteurs et Porte-cassettes," and the words "transient traders," in sec. 296 (56), by the same French word "colporteurs." This is contemporaneous exposition by the Legislature that the words are of synonymous meaning; and it may be taken that "transient trader" is a euphemistic equivalent for the old-fashioned "hawker." The meaning conveyed by "tran-

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sient" is, that the person is only in temporary and not permanent residence, as in the "hawker" clause of the Act; and one would be accounted "transient" who lived there less than a year and whose name was not on the assessment rolls.

In the Municipal Act of 1873 there was a variation, and the license was to be for transient traders and other persons who occupy premises "for temporary periods," and are not on the roll: 36 Vict. ch. 48, sec. 384 (53). In the R.S.O. 1887 the "hawker" clause leaves out all reference as to persons who have not become permanent residents, and leaves it as it was in the original statute of 1816 (R.S.O. 1887, ch. 184, sec. 495 (3)); and so it is carried into the present revision, R.S.O. 1914, ch. 192, sec. 416 (1).

In this last revision the term of residence must be at least three months before beginning business, otherwise the man is a "transient trader:" sec. 420, clause 7 (b).

These historical references I have made to shew that the enactments as to hawkers, pedlars, and transient traders are *in pari materiâ* and should be so construed in considering the question involved in this appeal. The word "colporteur," descriptive of a person who carries his wares with him, has now become an English word with a specialised meaning as one who sells and distributes Bibles and religious writings. As such he is exempt from the operation of the English law by judicial construction: *Gregg v. Smith* (1873), L.R. 8 Q.B. 302; and he was exempted in this Province by local legislation, 13 & 14 Vict. ch. 7 (1850).

Throughout the whole course of legislation as to petty traders, exemptions are made in express terms as to commodities which are the growth or produce of the Province (so in the Act of 1816—so in the C.S.U.C. 1859, ch. 54, sec. 284 (3)). The exception was omitted, probably by inadvertence, in 1866 (29 & 30 Vict. ch. 51, sec. 286 (3)), but restored again in 1869. 32 Vict. ch. 43, sec. 19. The clause appears to be omitted in the revision of 1877, ch. 174, sec. 465 (3); but it reappears in the revision of 1887, ch. 184, sec. 495 (3), and in that of 1897, ch. 223, sec. 583 (14), and down into the last revision, R.S.O. 1914, ch. 192, sec. 416, clause 1 (a). This exception, I think, plainly is

meant to extend to the dealings of persons who might otherwise be called temporary traders.

But yet for another reason I think the judgment in appeal is right, that the Act does not apply to the case of a farmer selling his own products, the fruits or roots grown out of his land. As to his selling and disposing of these he is not a "trader" in any proper sense. The "other persons" of the transient traders section is to be read as "trading persons," and the farmer's occupation is not a trade, though it may be a business. "Trade" and "trader" are the leading words of the legislation, and they have a well-defined meaning distinctive from the calling of a farmer or fruit-grower. Lord Davey said in *Grainger & Son v. Gough*, [1896] A.C. 325, 345-6: "Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased;" and in *Harris v. Amery* (1865), 35 L.J.C.P. 89, 92, Willes, J., distinguished farming as a business other than a trade: "It has never been doubted that farming was a business, though it could not properly be called a trade, since the latter has the technical meaning of buying and selling." See *Pinkerton qui tam v. Ross* (1873), 33 U.C.R. 508, at p. 514.

Again, the allocation of the words "goods, wares, and merchandise" point to relations of trade and commerce, and are not suggestive of agricultural pursuits and farm products. The matter has been considered as to "fish" in Saskatchewan: *Rex v. Prosterman* (1909), 11 W.L.R. 141.

The Municipal Act, while regulating sales in markets, enacts "that farmers and other producers may sell fruit, roots, and other produce at stores and shops at any time:" sec. 401, subsec. 5 (a). I do not need to refer to other sections of the Act shewing the privilege of farmers, which are dealt with by the Police Magistrate in his carefully considered judgment, which I think to be correct on all points.

The stated case should be answered in the affirmative, upholding the decision that the Act does not apply to the case of a farmer selling his own produce, and costs should be given in his favour.

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[APPELLATE DIVISION.]

Feb. 10.
Dec. 21.TILBURY TOWN GAS CO. LIMITED V. MAPLE CITY OIL AND GAS
CO. LIMITED.

Contract—Agreement between Companies for Supply of Natural Gas—Construction and Scope—Right of Supplying Company to Supply Others—Remedy for Breach—Injunction—Damages—Purchase of Fee in Lands Subject to Gas-leases—Right of Purchaser to Forfeit or Accept Surrender of Leases—Interest in Land—Gas Treated as Chattel—Validity of Contract—Rule against Perpetuities.

Although the provisions of the agreement in question—an agreement for the supply of natural gas by the M. company to the T. company, the principal clauses of which are set out below—gave a wide range to what might be asked of the M. company, it was *held*, that they had not the effect of compelling that company to store up all its assets in order to be able, at some future indefinite time, to meet any possible demand which might be made upon it by the T. company; in effect, the agreement conceded to the M. company the right to supply others with gas after the T. company had been supplied.

Dolan v. Baker (1905), 10 O.L.R. 259, 270, applied.

Semble, that if the M. company were withholding gas to the detriment of the T. company, the right to an injunction would depend on the circumstances then existing.

Held, however, upon the evidence, that the T. company had suffered no wrong at the hands of the M. company or the other defendants.

Held, also, that the defendant the G. company had the right to buy the fee in the lands worked by the M. company; having done so, it could forfeit or accept a surrender of the leases, unless its doing so interfered with the rights of the T. company under the contract; if that contract did not relate to land so as to give the T. company an interest in it, that company could not complain of the dealings of the other two companies *inter se*; and in the contract the gas was dealt with as a chattel only, just as severed trees may be.

The defendants pleaded that the whole contract was void as transgressing the rule against perpetuities; but this could have reference only to clause 5, giving a right of entry upon the lands, at the T. company's option, to bore for gas. Whether clause 5 was void or not, the rest of the contract was effective and binding; clause 5 gave a remedy only upon breach of it; and it was unnecessary now to decide the point raised.

Judgment of LENNOX, J., reversed.

THE above-named action was brought by the Tilbury Town Gas Company Limited, plaintiff, against the Maple City Oil and Gas Company Limited, the Glenwood Natural Gas Company Limited, and the Hope Engineering Company Limited, defendants.

A cross-action was brought by the Maple City Oil and Gas Company Limited and James Alphonsus Quillman, on behalf of himself and all other shareholders of that company, plain-

tiffs, against the Tilbury Town Gas Company Limited and T. K. Holmes, defendants.

The claims made in the actions are stated in the judgments.

The actions were tried together by LENNOX, J., without a jury, at Chatham.

I. F. Hellmuth, K.C., *W. M. Douglas*, K.C., and *J. G. Kerr*, for the Tilbury Town Gas Company Limited.

O. L. Lewis, K.C., and *W. G. Richards*, for the Maple City Oil and Gas Company Limited and Quillman.

J. W. Bain, K.C., *Christopher C. Robinson*, and *M. L. Gordon*, for the Glenwood Natural Gas Company Limited.

February 10. LENNOX, J.:—The action as against the Hope Engineering Company Limited was dismissed before trial. There is no cause of action shewn against T. K. Holmes. In other respects the issues in the first action cover all issues in the cross-action, and it was agreed that the two actions should be tried together. The trial and argument occupied a long time, but the issues to be determined are not numerous or very difficult. The contest is in the main between the Tilbury Town Gas Company and the Maple City Oil and Gas Company.

The rights of the plaintiff company, if any, against the Maple City company, are covered by an agreement between these companies entered into on the 22nd July, 1912. This agreement is set out in full in the statement of claim.

It recites that the companies are incorporated under letters patent of the Province of Ontario, and this statement was then and is now true; that "the Maple City company represents that it owns or has leases of lands with the right and authority to bore and operate for natural gas to be removed and marketed as to the Maple City company may seem proper;" and, amongst leaseholds, specifically mentions leases of the Cooper farm, in the township of Romney, and the Charlton farm and Cofell farm, in the township of Tilbury East, all in the county of Kent, and that this company "may obtain or procure other lands or leases with the right to operate thereon or thereunder for and to produce natural gas therefrom;" that "the Tilbury company re-

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presents that it has a franchise or agreement under which it has the right to supply and sell natural gas to the Corporation of the Town of Tilbury . . . and it may thereafter obtain franchises or right to supply and sell gas elsewhere than in the said town of Tilbury;" that "both of the said companies desire that the Maple City company shall have and operate for and supply to the Tilbury company and that the Tilbury company shall sell, market, and consume all the natural gas to be obtained from the lands hereinbefore described and other lands which the Maple City company shall obtain the right, authority, or leases to operate upon for the purpose of producing gas; and that such gas shall be operated for, obtained, and delivered by the Maple City company to the Tilbury company for sale or consumption in Tilbury and elsewhere under the franchises or agreements of the Tilbury company."

The agreement further provides: "The Tilbury company agrees with the Maple City company to receive, accept, and take from the Maple City company, and the Maple City company agrees to bore or operate for, supply and deliver, as and when required, to the Tilbury company, natural gas to the full extent of their requirements at all times, which can be obtained in such merchantable quantities from the said lands now held or which may hereafter be held as aforesaid by the Maple City company, and which gas may be required for supply or marketing or sale by the Tilbury company, or used by the Tilbury company within the limits of the town of Tilbury or within the township of East Tilbury, . . . or elsewhere under any franchise or agreement by which the Tilbury company may from time to time have the right or power to deliver, distribute, or market or use natural gas and may desire to do so;" that "the gas shall be delivered into the pipe-lines or piping of the Tilbury company . . . where the pipe-lines of the Tilbury company now are . . . or elsewhere at places acceptable to the Tilbury company;" that certain methods shall be pursued for the purpose of ascertaining the quantities supplied, and that the gas will be paid for at specified rates and at defined periods; that the Maple City company shall regularly deliver according to the requirements of the Tilbury company, and maintain sufficient pressure, and, this

being done, that the Tilbury company will not procure gas elsewhere; that the Maple City company will maintain the supply and pressure continuously, if it can be procured in merchantable quantities, and "will not supply or deliver gas or allow gas to be taken from the lands aforesaid now or hereafter held or leased by the Maple City company, or agree so to do, except subject to the rights of the Tilbury company hereunder, and after the Tilbury company shall be supplied as aforesaid with all the gas required by it, or to which it may be entitled for supply or marketing or sale or use by the Tilbury company as aforesaid;" that, if the Maple City company shall make default, the Tilbury company will have the right to enter the lands, bore and operate wells, and meet its requirements.

The three leases specifically above referred to were registered upon the lands they affected, and, by mesne assignments, became vested in the Maple City company before the execution of the agreement just recited.

This agreement of the 22nd July was registered upon the lands covered by these three leases on the 23rd January, 1913.

It will be convenient here to refer to the attitude of the defendant companies. They allege in their pleadings that the agreement of the 22nd July, 1912, is not binding upon them, (a) because the assent of the Maple City company to its execution was obtained by fraudulent or quasi-fraudulent misrepresentations of some of the directors, and was not (in a legal sense, I presume) approved or authorised by the company, (b) because the meeting for approval was not regularly or legally convened, and the agreement was inequitable and improvident.

There was no attempt made to establish this defence; and, were it not that the defendants refused specifically to withdraw it, I need not refer to it. Having regard to the gravity of the charge set up, it is right to say distinctly that there is no circumstance or evidence in the case to support or suggest any reason for this allegation.

These defendants also allege that the contract offends against the rule relating to remoteness and perpetuities, and is unenforceable; also that the agreement is *ultra vires* of the plain-

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tiff as a company. I am of opinion that these submissions cannot be sustained.

The defendants set up that in any event the plaintiff company was bound to take all its supplies of gas from the Maple City company, and, discovering that it did not do so, the Maple City company gave notice and terminated the agreement. It is not worth while to discuss whether this would be the Maple City company's remedy; it is sufficient to say that the only times when this occurred were occasions upon which it was impossible to obtain a sufficient supply under the agreement, were casual and insignificant, and the Maple City company sustained no loss or inconvenience thereby, and, on the contrary, rather benefited, as this company was paid for the entire consumption of gas as if it had all been regularly furnished; and, in the circumstances, the defendants shew no grounds of defence under this plea.

There are other defences which I will deal with in connection with the Tilbury company's claim. Speaking only in general terms, this company complains that it has not at all times been supplied with gas as required, and that the pressure has not been regular, and at times has been insufficient. The defendant the Maple City company, to meet this, gives evidence to shew that the Tilbury company's pipe-line is of irregular sizes and defective, and that the plaintiff company should provide for regulation of the pressure. In answer to this, again, it is said that the Maple City company at times did not turn on a sufficient number of wells. I am of opinion that there is not much to be said in favour of either side upon this question at the present time; it may become an important question in the working out of their agreement later on. So far as it touches this action, both sides, I think, are attempting to make a great deal out of very little. I do not think it became an issue until the defendant companies decided to get out of the agreement in any way they could, and until the Tilbury company decided to bring an action by reason of diversion or contemplated diversion of gas, and became alert in collecting subsidiary grounds of complaint. The pipes are as good or better than they were at the date of the agreement. The Maple City company contracted

with reference to them as they were. That was the time to stipulate as to the pipe system and regulators to be supplied by the Tilbury company, and they made no complaint until after action. This looks like a make-weight on both sides. This is not saying that, if this agreement is to be continued, and the quantity of gas to be delivered is substantially increased, the Maple City company will not have a right to insist upon a larger and better pipe system to deliver into. This question does not arise now. I think it can very well be eliminated from the consideration of this action.

Stripped of its frills, and it is a stronger claim without them, the Tilbury company's complaint is, that the defendant the Maple City company determined to break its contract—to deplete the gas-field from which the Tilbury company was to get a continuous supply of gas, to make it impossible for this company to extend the sphere of its operations, as was contemplated by both parties and provided for by the agreement, and that to this end the Maple City company, in conjunction with its co-defendant the Glenwood company, and persons identified with that company in interest, identified for the most part with both companies in fact, set about to obtain a collusive forfeiture or surrender of the Cooper and Cofell leases, to sink additional wells upon the Cooper, Charlton, and Cofell farms, and, in conjunction with the Southern Ontario Gas Company, to divert the gas which should be available for the Tilbury company and their future as well as existing customers, to London, St. Thomas, and other eastern cities and towns; that the Glenwood company is under contract with the Southern company, has already sunk several wells upon the leased properties referred to, and was about to connect them with the Southern company's pipe system, and will do so, to the prejudice of the Tilbury company, unless restrained by the Court. I am satisfied that the Tilbury company has made out this claim.

Miss M. L. Quillman is an exceptionally clever young lady, and zealous in the service of her employers. She it was, I think, who worked out the details of the scheme to put an end to the leases. A great deal of what she says is probably true; an exception to this is her evidence about the cheque of the Tilbury

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company to the Maple City company of the 19th August, 1913, for \$2,185.88, upon the face of which is written the words "Gas for Feb., Mar., Apr., May, and June, 1913." I cannot accept Miss Quillman's statement that these words were not on the cheque when she received it and had it deposited. The evidence is overwhelmingly the other way. She says she noticed the wording of the letter accompanying it—the same in effect—but that she used the cheque because she noticed that, although in the letter, the words were not upon the cheque. She remembers a blank that was not there. I am forced to the conclusion as a matter of fact that the words were there and were read, but their effect was not appreciated until later on. There was no answer or objection made to the letter, cheque, or the statement at the time. This evidence is of no great importance in itself; it is very important, however, as an unhesitating attempt to fasten a fraudulent act upon the gentleman who issued the cheque, and as a key to the proper weight to be attached to other portions of Miss Quillman's evidence; for instance, her account of why she took action in reference to the Cooper and Cofell leases; and, although her evidence in reference to this proceeding is undoubtedly true at many points, I cannot accept it as a whole as an honest account of an honest transaction. The scheme was instituted after the determination had been reached to escape the provisions of the agreement of the 22nd July, 1912, if possible. In view of their attitude at the trial, I am not satisfied that the defendant companies ever honestly believed that this agreement was obtained irregularly or by misrepresentation. There is no object in reviewing the history of the transaction; Mr. Symmes fighting Mr. Symmes, and Miss Quillman defaulting and surrendering to Miss Quillman, and the whole devious course of proceedings, is palpably dishonest, and cannot be allowed to affect the contractual rights of the plaintiff company, as they stood of record in the county registry office before any of these proceedings were instituted.

Now as to the main question—the depletion of the oil-field from which, under the agreement, the Tilbury company is to obtain a permanent supply of gas. If the Maple City company, acting in good faith and in conjunction with the Tilbury com-

pany in working out the agreement, should find itself liable to sustain a loss by reason of a temporary surplus of gas which the Tilbury company, after notice and the lapse of a reasonable time, is unable or unwilling to take, it may be that in such case the Maple City company could, for the time being, dispose of this surplus elsewhere so as to prevent any financial loss to the company; but this question, although perhaps indefinitely suggested by the 9th paragraph of this defendant's statement of defence, has not arisen—is not presented to me for determination—and I express no opinion as to it. It is not shewn that the Maple City company ever notified the Tilbury company of a surplus of gas, or required it to accept of a larger quantity; or that the wells, the sinking of which is complained of, were put down for a supply of gas to the plaintiff company, or in pursuance of the contract. On the contrary, I am of opinion that the agreement requires the Maple City company so to act as to secure, as far as possible, a permanent or quasi-permanent source of supply of gas for the Tilbury company; and I find that, in direct repudiation of the obligations of the Maple City company to the Tilbury company, and with actual notice to the Glenwood company of these obligations, and with knowledge of its effect in rapidly exhausting the supply of gas, and without complaint to the Tilbury company, or affording the option of arranging to take a larger supply, the defendant companies entered into an arrangement to deliver this gas to London and elsewhere, and the wells in question were put down in pursuance of that arrangement and to effect that purpose. It is conceded on all hands that the supply of gas is limited, and the greater the number of wells in operation the sooner will it be exhausted. I cannot accept the statement that these wells were in good faith put down as off-setting wells, and it would not be an answer if they were. If the Maple City company proposed to reserve a right to sink off-setting wells in certain contingencies, they had to provide for it in their agreement. Neither am I able to accept unreservedly the theory that all the wells within the entire area of the Tilbury gas-field draw from the same gas-pockets. It is not pretended that it has ever been demonstrated that it is so. All that can be affirmed is that it may be so—or

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at the very most that it is probable. But, as there are external barriers to the north, south, east, and west of the field, taken as a whole, so it may well be that there are ridges of impervious strata intersecting the field at some or many intermediate points. On both sides it is theory and speculation only.

It does not matter: it was for the Maple City company, when it made its contract, to introduce qualifications or saving clauses, or take chances. It took chances as to what others might do—and, whatever others may do, the company cannot itself derogate from its own grant. So far from introducing any saving clause pointing to a right to resort to off-setting wells, it expressly agreed to bring in all properties subsequently acquired.

There will be judgment for the plaintiff in the terms of the prayer of the statement of claim, with costs, including all costs over which I have a disposing power as trial Judge, and dismissing the counterclaims with costs.

The evidence is sufficient to entitle the plaintiff company to an order perpetually enjoining both defendants from operating the wells complained of, except for the supply of gas to the plaintiff company, but there is no specific prayer for this relief. The plaintiff company will be at liberty to amend its statement of claim so as to cover this, and, if this is done within ten days, such an injunction will be granted, but reserving to the defendant companies the right to apply to the Court hereafter to have the injunction modified or dissolved, upon shewing sufficient ground therefor under conditions subsequently arising.

And there will be judgment in the cross-action of the Maple City company and another against the Tilbury Town Gas Company and T. K. Holmes, dismissing the action with costs, including costs, if any, reserved for the trial Judge.

The Maple City Oil and Gas Company Limited and the Glenwood Natural Gas Company Limited appealed from the judgment of LENNOX, J.

April 28, 29, and 30. The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

G. Lynch-Staunton, K.C., O. L. Lewis, K.C., and E. Sweet,

for the appellant the Maple City Oil and Gas Company Limited. The important question as to the interpretation of the agreement of the 22nd January, 1912, is governed, as is admitted by the plaintiff company, by the surrounding circumstances, which support the position of the defendants. The Court will not make a judgment which requires its constant supervision in order to make it effective. The judgment of the learned trial Judge has not dealt with the vital question of the duration of the agreement, which can only be during the existence of this contract. It is merely a chattel interest which we have agreed to sell, which gives to the plaintiff company no right to enter upon the lands, and the plaintiff company's only remedy is in damages. Counsel referred to *Dominion Coal Co. v. Dominion Iron and Steel Co.*, [1909] A.C. 293, 311; *Fothergill v. Rowland* (1873), L.R. 17 Eq. 132; *Donnell v. Bennett* (1883), 22 Ch.D. 835; *Chaplin v. Hicks*, [1911] 2 K.B. 786. It is within the jurisdiction of this Court to overrule or disapprove the decision of Fry, J., in *Donnell v. Bennett*.

J. W. Bain, K.C., and *Christopher C. Robinson*, for the appellant the Glenwood Natural Gas Company Limited, stated that the position of their client is that, if the Court agrees with the contention of the other appellant, it is satisfied; but, if the Court agrees with the judgment of the learned trial Judge, this appellant contends that that judgment should not bind it. The two defendant companies are entirely separate entities. The surrenders accepted by this defendant were not collusive, as stated by the trial Judge, and in any case they are valid and should be given effect to. The agreement relied upon does not bind the lands, and is void as transgressing the law against perpetuities. The plaintiff company relies upon *Tulk v. Moxhay* (1848), 2 Ph. 774; but the doctrine of that case has been considerably modified: *London County Council v. Allen*, [1914] 3 K.B. 642, *per* Buckley, L.J., at p. 660. They also referred to *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch.D. 562, 580; Gray's Rule against Perpetuities, 2nd ed., p. 264, para. 298; *Young v. Chalkley* (1867), 16 L.T.R. 286.

I. F. Hellmuth, K.C., *W. M. Douglas*, K.C., and *J. G. Kerr*, for the plaintiff company, respondent, argued that the findings

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of the learned trial Judge upon the facts of the case should be supported, and were in accordance with the overwhelming effect of the testimony. The defendants have changed their position on the pleadings, where they set up that the agreement was inequitable and improvident and that it was obtained by fraud. The evidence shews quite clearly that such drilling as was done by the Glenwood company would exhaust the supply of gas, and so defeat the scope and object of the agreement. We were not bringing a certain amount of gas, but entering for the purpose of our business into a contract for the supply of gas at all times, and from time to time as we might require it. The intention of the agreement is set out in the first recital, and there is nothing to contradict it in the operative part. We take the risk of natural but not of artificial depletion. The action of the defendants is not *bonâ fide*, and is inconsistent with the rights secured to us under the agreement. They referred to *Canadian Railway Accident Co. v. Williams* (1910), 21 O.L.R. 472; *McLeod v. Lawson* (1906), 8 O.W.R. 213. The right given to us under the agreement is not a chattel, nor does it offend against the law of perpetuities: Halsbury's Laws of England, vol. 22, p. 299; *Docker v. London-Elgin Oil Co.* (1907-8), 10 O.W.R. 1056, 11 O.W.R. 726; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, 116; Gray, *op. cit.*, pp. 59, 61, paras. 71, 75. As to the right to an injunction, reference was made to *National Phonograph Co. v. Edison-Bell Phonograph Co.*, [1908] 1 Ch. 335; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352, 366, 367, affirmed, [1901] 2 Ch. 37; *Clegg v. Hands* (1890), 44 Ch.D. 503; *In re Nisbet and Potts' Contract*, [1906] 1 Ch. 386. The decision of Jessel, M.R., in *Fothergill v. Rowland*, L.R. 17 Eq. 132, relied on by the appellants, referred to a quite different kind of contract from that now in question: see pp. 139, 140, 141. This is also the case with the decision in *Dominion Coal Co. v. Dominion Iron and Steel Co.*, *supra*. On the question of surrender they referred to Woodfall's Landlord and Tenant, 18th ed., pp. 350, 358, 369; Foa's Landlord and Tenant, 4th ed., pp. 642, 651, 652, 669; *Great Western R.W. Co. v. Smith* (1876), 2 Ch.D. 235, 253, affirmed in *Smith v. Great Western R.W. Co.* (1877), 3

App. Cas. 165; *Doe dem. Beadon v. Pyke* (1816), 5 M. & S. 146, 154, 155.

Lynch-Staunton, in reply, argued that it was in the contemplation of both parties to the agreement that the plaintiff company should extend its field of operations so as to permit of the Maple City company developing to the extent of its capacity. As a matter of fact, the plaintiff company had not extended its operations as was contemplated, and the effect of the judgment would be to restrict the respondent company to doing one-third of the business which it might do. He referred to *Smith v. Colbourne*, [1914] 2 Ch. 533; Halsbury's Laws of England, vol. 22, p. 320, note (u); *Thomas v. Thomas* (1902), 87 L.T.R. 58.

Bain, in reply, referred to the judgment of Farwell, J., in *In re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, especially at p. 399.

December 21. The judgment of the Court was delivered by HODGINS, J.A.:—In his view of the actions of all parties I agree generally with the learned trial Judge. But, apart from that, the case raises an important question as to the interpretation of the contract of the 22nd July, 1912, between the Tilbury company and the Maple City company.

The key-note to the judgment appealed from is to be found in this sentence taken from the learned trial Judge's reasons: "I am of opinion that the agreement requires the Maple City company so to act as to secure, as far as possible, a permanent or quasi-permanent source of supply of gas for the Tilbury company."

From that standpoint the following consequences flow, under the terms of the formal judgment, which is as follows:—

"1. This Court doth declare that the plaintiff is, under the agreement set forth in the statement of claim and dated the 22nd day of July, 1912, entitled to sell and market or consume all of the natural gas to be obtained from the lands described in the said agreement, except such as is required by the defendant the Maple City Oil and Gas Company Limited, for the supply of the contracts or undertakings entered into by it with consumers at Merlin and along its pipe-line and in force on the

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said 22nd day of July, 1912, and doth adjudge the same accordingly.

“2. And this Court doth further declare that the defendant the Maple City Oil and Gas Company Limited has no right to bore or operate upon the said lands for natural gas, or to supply and deliver the same, except when and as required by the plaintiff, and that the defendant the Maple City Oil and Gas Company Limited has no right to sell or bore for gas for delivery in merchantable quantities to any corporation, person, or persons other than the plaintiff, except such as is required for its consumers at Merlin and along its pipe-line as aforesaid, and doth adjudge the same accordingly.

“3. And this Court doth order and adjudge that the defendants the Maple City Oil and Gas Company Limited and the Glenwood Natural Gas Company Limited, and each of them, and their and each of their servants, workmen and agents, be and they are hereby perpetually enjoined from operating the wells mentioned in the statement of claim, or any of them, or drilling or operating any new wells upon the lands in the statement of claim described, except for the supply of gas to the plaintiff, and for such other supply as comes within the exceptions above set forth, and from otherwise boring or drilling or operating for gas, contrary to the rights of the plaintiff as above declared.

“4. And this Court doth further order and adjudge that the defendant the Maple City Oil and Gas Company Limited do continue to produce, supply, and deliver natural gas to the amount of the requirements of the plaintiff under the said agreement.

“5. And this Court doth further order and adjudge that, in default of compliance with the order contained in paragraph 4 hereof, the plaintiff is entitled to enter upon the said lands, or any of them, and drill for and produce such gas as it requires.

“6. And this Court doth further order and adjudge that the notices for forfeiture and the surrenders of the leases in the pleadings mentioned are fraudulent and void, and that the same be and they are hereby set aside, in so far as they may be deemed

to have any effect upon the rights of the plaintiff in the premises.”

I am unable, with great respect, to arrive at the same conclusion as did the learned trial Judge.

The recitals in the agreement, where wider than the contractual stipulations, cannot extend them. Dealing with the latter, clauses 1 and 3 are as follows:—

“1. The Tilbury company agrees with the Maple City company to receive, accept, and take from the Maple City company, and the Maple City company agrees to bore or operate for, supply and deliver as and when required, to the Tilbury company, all the natural gas to the full extent of its requirements at all times which can be obtained in merchantable quantities from the said lands now held or which may hereafter be held as aforesaid by the Maple City company, and which gas may be required for supply or marketing or sale by the Tilbury company, or used by the Tilbury company within the limits of the town of Tilbury, or within the township of Tilbury East, in the county of Kent, or elsewhere, under any franchises or agreements under which the Tilbury company may from time to time have the right or power to deliver, distribute, or market or use natural gas, and may desire so to do.”

“3. And the Tilbury company agrees with the Maple City company that it will not, while the present franchise or agreement with the Town of Tilbury for the supply therein of natural gas by the Tilbury company shall remain in existence and in force, take or procure natural gas from any other company or person than the Maple City company for the supply of natural gas in the town of Tilbury, so long as and provided that the Maple City company shall continuously supply from the land hereinbefore described to the Tilbury company sufficient natural gas with at all times sufficient pressure and regularity of delivery required for the purposes from time to time of the Tilbury company and the persons or corporations taking or buying such gas from the Tilbury company, and the Maple City company agrees with the Tilbury company that it will produce, supply, and deliver to the Tilbury company hereunder sufficient natural gas with sufficient pressure and regularity of delivery

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from time to time required for the purposes as aforesaid continuously (provided that same can be obtained in merchantable quantities in or upon said land), and will not supply or deliver gas or allow gas to be taken from the lands aforesaid now or hereafter held or leased by the Maple City company, or agree so to do, except subject to the rights of the Tilbury company hereunder, and after the Tilbury company shall be supplied as aforesaid, will all the gas required by it, or to which it may be entitled for supply or marketing or sale or use by the Tilbury company as aforesaid."

Under these provisions the amount of gas to be delivered to the respondent is to be (clause 1) "to the full extent of its requirements at all times . . . and which gas may be required for supply or marketing or sale by the Tilbury company;" and (clause 3) "sufficient natural gas with at all times sufficient pressure and regularity of delivery required for the purposes from time to time of the Tilbury company."

While the requirements of the Tilbury company may arise under the contracts for present supply, they may include demands "under any franchises or agreements under which the Tilbury company may from time to time have the right or power to deliver, distribute, or market or use natural gas, and may desire so to do."

These give a wide range to what can be asked of the Maple City company, but they do not, consistently with the concluding part of clause 3, as it seems to me, compel that company to store up all its assets in order to be able at some indefinite future time to meet any possible demand which may be made upon it by the respondent.

Clause 3 in effect concedes to the Maple City company the right to supply others with gas after the respondent "shall be supplied as aforesaid with all the gas (1) required by it, (2) or to which it may be entitled for supply or marketing or sale or use by the Tilbury company as aforesaid."

It is not seriously disputed that the Maple City company has provided all the gas required by the respondent, as in (1) above; and, after a perusal of the evidence, I agree with the opinion expressed by the trial Judge on this point. And I

think the respondent is entitled under (2) only to what it actually requires and demands from time to time, and not to the creation and preservation of a reserve fund of untapped or unexhausted gas which, in the meantime, costs it nothing, although it might cost the Maple City company a very considerable expenditure, and the enforced retention of which would deprive it of the right given by the contract of selling "subject to the right of the Tilbury company." That expression would be meaningless if its import was that what it could sell would be nothing at all because of possible demands in the future.

I find nothing in the contract which militates against this construction.

The recital that it is desired that the Tilbury company "shall sell, market, or consume all the natural gas to be obtained from the said lands," is explained by the further words, that the gas shall be obtained and delivered for sale or consumption in Tilbury or elsewhere "under the franchises or agreements of the Tilbury company." This means under actual or existing franchises or agreements, whether now or subsequently acquired; for no delivery could be required under rights and contracts unless they were operative and in force. This is definitely expressed in clause 1 by the words "under which the Tilbury company have the right or power to deliver . . . and may desire so to do."

The clause as to payment (2) of course provides for settlement on delivery, and is to be for natural gas marketed and sold or used by the Tilbury company, and nothing by way of recompense is suggested for the forbearance of the Maple City company in acting so as to secure a permanent source of supply for the Tilbury company.

A circumstance of some weight is that, under clause 3, the provision that the Maple City company will not supply or deliver gas, etc., except subject to the rights of the Tilbury company, affects not only the land included in the recited leases, but that "hereafter held or leased by the Maple City company."

If the rights of the respondent are as extensive as it claims, then all the lands afterwards acquired would be tied up and rendered unproductive, no matter how great the disparity be-

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tween their productiveness and the requirements of the respondent.

I think the words of Mr. Justice Anglin in *Dolan v. Baker* (1905), 10 O.L.R. 259, at p. 270, may well be applied in this case: "The unfairness to the vendor of any construction of the instrument, which would give to the purchaser an option to cut and remove, to be exercised at some indefinite future date, however remote, in effect tying up the timber forever for no consideration, unless the purchaser should see fit to exercise his rights over it, affords the strongest possible reason for believing that the parties never contemplated such an arrangement."

It is in point to refer to the learned trial Judge's opinion on the effect of the additional wells, which is as follows: "Neither am I able to accept unreservedly the theory that all the wells within the entire area of the Tilbury gas-field draw from the same gas-pockets. It is not pretended that it has ever been demonstrated that it is so. All that can be affirmed is that it may be so—or at the very most that it is probable. But, as there are external barriers to the north, south, east, and west of the field, taken as a whole, so it may well be that there are ridges of impervious strata intersecting the field at some or many intermediate points. On both sides it is theory and speculation only."

This, if it applies, as it may, to portions of the field, would involve the practical failure of the respondent's contention that the appellants are actually depleting the gas in the original field rather than opening new ones. I think the evidence amply supports the statement that, while the proximity of other wells makes it likely that both will draw from the same field, it is only theory and speculation to assert it as inevitable.

If the Maple City company was withholding gas to the detriment of the respondent, it might be that an injunction would be granted to compel its supply. This would, however, depend upon the evidence offered as to the situation and abilities of the parties and as to their plant and connections, and it is not a question to be decided now. If the respondent's rights are as far-reaching as it contends, then, under the concluding words of clause 3, the Maple City company could well be en-

joined from allowing gas to be taken from a sufficient area of the lands in question, if it still owned them. But, if it had parted with them to others not bound by the covenant or not having notice thereof, or if damages were a sufficient remedy, or if the contract is one for the sale of chattels only, it would be open to it to argue that an award of damages was a sufficient remedy. That relief was deemed adequate in *Silkstone and Dodsworth Coal and Iron Co. v. Joint Stock Coal Co.* (1876), 35 L.T.R. 668, and was given in *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, in *Kohler v. Thorold Natural Gas Co.* (1914), 6 O.W.N. 67, 26 O.W.R. 31, and in *Dominion Coal Co. v. Dominion Iron and Steel Co.*, [1909] A.C. 293.

The original contracting parties have now passed under the control of large rival concerns, one desirous of sterilising the Maple City company's resources, and the other of exploiting them. Present conditions are radically different from the original situation in reference to which the contract was framed, and it is a waste of time to try and square the language of the agreement with a set of circumstances never contemplated by the parties when they made it. Both concerns went into the fight fully aware of the exact terms of the contract. The present deadlock is the work of both parties, and their actions make it nothing but reasonable to regard that agreement as expressing by its words exactly what was intended and what they must be held to.

This would dispose of the action upon the ground that the respondent has suffered no wrong at the hands of the appellants, were it not for the other defences raised by the appellants. Instead of merely submitting their construction and offering to perform their obligation, the appellants plead that the whole contract is void as transgressing the rule against perpetuities, and set up the vesting of the properties in the Glenwood company and the subsequent cancellations of the gas-leases. While these defences are not now necessary, if the judgment in appeal is reversed, they must be disposed of, because they affect the basis on which the contract rights, even as now defined, must depend.

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By paragraph 6 of the formal judgment, the surrenders and forfeitures are set aside "in so far as they may be deemed to have any effect upon the rights of the plaintiff in the premises." I agree that the findings of the learned trial Judge upon the facts would fully entitle them to this relief under the contract as construed by him, and in his views on those facts I entirely concur. But I do not think the respondent is entitled, in point of law, to the relief given.

The Glenwood company had the right to buy the fee. Having done so, it could forfeit or accept a surrender of the leases, unless its doing so interfered with the rights of the respondent under the contract in question. If that contract does not relate to land so as to give the respondent an interest in it, the respondent cannot complain of the dealings of the appellants *inter se*. It is not necessary to decide whether natural gas is a chattel or an interest in land, for in this case it is dealt with only as the former, just as severed trees may be.

The Maple City company is to bore for and win the gas, and is then to deliver it "into the pipe-lines or piping of the Tilbury company on or opposite to the east half of lot 14, Middle Road South, in the township of Tilbury, where the pipe-lines of the Tilbury company now are upon the highway, there or elsewhere, at places acceptable to the Tilbury company."

This does not differ in any way from a contract to deliver logs or timber when cut by the vendor, which is not an agreement for the sale of or concerning an interest in land: *Smith v. Surman* (1829), 9 B. & C. 561; *Marshall v. Green* (1875), 1 C.P.D. 35, at p. 40.

So that the respondent has no right, except that arising out of the contract, to receive the gas when collected and ready for delivery in the pipes of the Maple City company. The words "which can be obtained in merchantable quantities from the said lands" are merely descriptive of the source of supply, and might well be used in such an agreement as I have mentioned for logs and timber from a particular timber limit or area, as was the case in *McCall v. Canada Pine Timber Co.* (1914), 7 O.W.N. 296, and in the Supreme Court of Canada (not yet

reported). The provisions as to delivery at sufficient pressure and with regularity indicate that the Maple City company is wholly charged with the duty of so handling the gas when won and controlled by it as to enable it to deliver it in a usable condition to the respondent. Till it does so, it is not appropriated, under the contract, to the latter. I think the remarks of Lord Atkinson in *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. at p. 116, indicate that natural gas, under circumstances similar to those in this case, is merely a chattel.

There remains to be considered the defence based upon the rule against perpetuities. In my view of the contract, this can only have reference to clause 5, giving a right of entry at the respondent's option upon the lands to bore for gas.

It must be remembered that, apart from that clause, this is a personal contract, and clause 5 gives a remedy only upon breach of it, to be exercised at the option of the respondent. Whether clause 5 is void or not, the rest of the contract is effective and binding.

The Maple City company, when the right arises, may be willing to perform the covenant or allow the exercise of the respondent's rights under it; and it is, therefore, unnecessary now to decide the point raised.

The result is, that the appeal should be allowed with costs, and the judgment should be reversed. There should be substituted for it a judgment declaring (if desired) that the contract in question, as now construed, is in full force and effect as between the Maple City company and the respondent, and directing that the respondent pay the costs of the action and counterclaim to the appellants.

Appeal allowed.

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[APPELLATE DIVISION.]

Dec. 23.

CAMERON V. MCINTYRE

Sale of Animal—Warranty—Breach—Contract—Findings of Jury—"Unsoundness."

When the vendor of an animal agrees to give a written warranty of soundness, he necessarily (1) asserts that the animal is sound, and (2) promises to give his assurance in writing. It is of no importance that the warranty is not reduced to writing—Equity looks upon that as done which should have been done; and an action will lie for breach of the warranty of soundness, if the animal turns out to be unsound.

In the circumstances of this case—where the vendee accepted the animal, upon the vendor's assertion that it was sound and his promise to give a written warranty of soundness, although the vendee had heard from others that it was unsound, and the vendor had endeavoured without success to substitute a new contract for the original one—it was *held*, that the original contract was still in existence, unmodified, and that the vendee was entitled to recover damages for breach of the warranty.

Head v. Tattersall (1871), L.R. 7 Ex. 7, explained and applied.

The unsoundness, to give an action on the warranty, must be existent at the time of sale—and that, upon the evidence, was the case here.

A malformation of a horse's foot may be an unsoundness.

Judgment of *Boyd, C.*, upon the findings of a jury, in favour of the plaintiff, the vendee, affirmed.

APPEAL by the defendants from the judgment of *Boyd, C.*, upon the findings of the jury at the trial, in favour of the plaintiff.

The following statement of the facts is taken from the judgment of *RIDDELL, J.*:—

The statement of claim in this action alleges that the defendants, on the sale to the plaintiff of a stallion, "agreed to warrant said stallion to be sound and right in every way," "to give . . . a written warranty that the said stallion was sound and right in every way;" that the stallion was in fact unsound; and claims (1) damages and (2) that the notes given in payment for the stallion be delivered up to be cancelled. The statement of defence alleges that the plaintiff was well aware of the stallion's "qualities and character," and "bought on his own knowledge and examinations, and not on any representations of the defendants."

The action coming on for trial at Guelph before the Chancellor and a jury, the jury gave answers to questions as follows:—

"1. On or before the date of the sale, the 6th of February, 1915, did the defendant* represent that the horse was sound and right in every way? A. He did.

*There were two defendants, McIntyre and Gabel. The defendant referred to in the questions is the defendant McIntyre.

"2. Did he then state that he would give a written warranty that he was sound and right in every way? A. Yes.

"3. Did the defendant say that the horse was a sure foal-getter, and that he had made a good season the preceding year? A. Yes.

"4. Did the defendant offer to give anything more than his own guarantee that the horse was a fifty per cent. foal-producer, the certificate of the veterinary surgeon that he was sound, and the horse's pedigree? A. Yes.

"5. If he said he agreed to give more, say what it was? A. His personal guarantee that the horse was sound and right in every way.

"6. If you think that the plaintiff should get damages, say how much? A. \$1,200, and the defendant pay the costs of the Court.

"7. Was the horse reasonably fit to travel the country road as a stallion? A. No.

"8. If there was any warranty, was there any breach of it, and what was the breach? A. He didn't get a sound horse."

Judgment was thereupon ordered to be entered for the plaintiff for \$1,200 and costs.

The defendants now appeal.

December 16 and 17. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

D. L. McCarthy, K.C., and *George Bray*, for the appellants. Once the plaintiff knew that the defendant McIntyre would not give the written guarantee of soundness, he should have refused to take the horse. He should have rescinded, instead of claiming damages for misrepresentation. There being no fraud, the plaintiff, having means of knowing the state of the horse before the sale, and having relied on the certificate of the veterinary before purchasing, was not entitled to claim damages: *Bawden v. London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534. As the plaintiff accepted and took away the horse, knowing that McIntyre would not give a written guarantee, he thus waived his right to rely on the warranty as to soundness: *Head v. Tattersall* (1871), L.R. 7 Ex. 7; *Wasteneys v. Wasteneys*, [1900] A.C. 446; *Moncreiff on Fraud and Misrepresentation*, p.

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295. The horse was not unsound at the time of sale, but merely malformed, and this did not constitute a breach of warranty: *Dickinson v. Follett* (1833), 1 Moo. & Rob. 299; Oliphant's Law of Horses, 5th ed., p. 128; *Brown v. Elkington* (1841), 8 M. & W. 132; *Bailey v. Forrest* (1845), 2 C. & K. 131.

J. B. Clarke, K.C., for the plaintiff, respondent, argued that the evidence shewed that the horse was unsound at the time of sale. The action was not based on the refusal of the defendant McIntyre to give a written guarantee of soundness, but on the breach of his verbal warranty that the horse was sound. When the plaintiff wanted to rescind, the defendant McIntyre would not allow it. There had been no waiver of the plaintiff's right to the warranty: *Wood v. Anderson* (1915), 33 O.L.R. 143.

McCarthy, in reply.

December 23. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—While counsel for the appellants does not admit the justice of the findings of the jury, he does admit that there is ample evidence to justify the answers, and does not ask us to set them aside—indeed it would be hopeless, on the evidence, to expect a reversal on the questions of fact found by the jury. But he relies upon the law as applicable to the facts appearing in the evidence—in great measure in the evidence of the plaintiff.

The plaintiff is a farmer, who had never owned a stallion; when the defendant McIntyre came to his place in 1913 to try to sell him a Clydesdale, McIntyre asked the plaintiff to go down to his sale-stable, at Listowel, which he did in April, 1914—he was shewn several horses there, but not a lame one in a box stall—this was, as it turned out, the horse the plaintiff afterwards got. No sale took place; the subject was renewed two or three times, till at length, on the 29th January, 1915, the plaintiff went down to the defendant's stable, said he wanted a good Clydesdale stallion, and was shewn "Bonny Earl." According to the plaintiff's story, which the jury have believed, "he" (i.e., the defendant McIntyre) "said he would guarantee the horse to be a sound horse; guarantee him to be right every way, and when he led him out on the floor, I says, 'His feet look pretty flat-looking;' 'Oh,' he says, he would 'guarantee his feet sound, good feet;'

and I asked him, was he a sure foal-getter? and he said he would guarantee him a sure foal-getter."

No purchase was effected that day. "He" (i.e., the defendant McIntyre) "asked me \$1,800 for the horse on that day; drew up notes to that effect, and wanted me to sign them, and I wouldn't, and he asked me to let him know later, and as I was leaving him that night he asked me to let him know later what I would pay, so I said I would let him know in a few days. I wrote to him on the 3rd of February and told him I didn't think I would bother buying the horse, as near as I can mind."

The letter is produced—it reads: "I don't think I will buy the horse at that price; but I will tell you what I will do. I will give you \$1,600, and you pay all the insurance. If that will suit you, all right, let me know—but, on the other hand, I would rather not to buy for a few years yet."

On the 6th February, the plaintiff and McIntyre met and went together to a hotel at Mount Forest. What took place I give in the plaintiff's words:—

"He said that he thought I was asking a little too much off him when I asked him to take \$1,600 and pay the insurance. I said I didn't think so, and I asked him what he was going to tax me for the horse, and he said \$1,700, and I said I wouldn't do it, and he says: 'I will tell you what I will do: I will sell him to you for \$1,650, and pay half the insurance;' and he drew up notes to that effect.

"Q. It was three notes for \$550 each? A. It was supposed to be that, but he didn't.

"Q. By mistake he drew up one for \$50 too little? A. Yes, and I said I wouldn't sign the notes unless he would pay the insurance.

"Q. The insurance was to be \$1,000? A. He said he would insure him for what he could get.

"Q. Now, before we talk of the signing of the notes; what was said about the horse on this particular occasion? A. He said he would guarantee the horse sound in every way, and he said he would give me a veterinary's certificate to say that he was sound, and he would give me a veterinary's certificate for insurance. He said he would guarantee him a sure foal-getter.

"Q. Anything else? A. Said he would guarantee him to fifty per cent.

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"Q. A sure foal-getter? A. Yes, sir.

"Q. Now, from what you say, you signed the notes there?

A. Yes, sir.

"Q. And what took place after that? A. Well, he was to ship the horse on the 16th of February to Mount Forest, and I was to meet him there.

"Q. On the 16th? A. Yes, sir.

"Q. Were you to take the horse from him at Mount Forest or at your own place? A. No, I was to meet him at Mount Forest and take the blanket up in the rig that I had, and he was to fetch him up to my stable.

"Q. That is, the defendant was to bring him and deliver him at the stable? A. Yes, sir.

"Q. That is what you parted at when you finally closed? A. Yes, sir."

The defendant McIntyre took away the notes with him.

A few days after this, two men came to the plaintiff's place, told his brother that the horse was lamed, and the plaintiff made up his mind to get out of the bargain if he could. On the 15th February, he telephoned McIntyre saying that he did not want the horse and not to ship him—McIntyre reiterated his representations as to the horse, and the plaintiff said, if that was the case, to ship him. It is clear that nothing done at this time in any way modified the contract.

The same afternoon, Bender, one of those who had spoken ill of "Bonny Earl", came to the plaintiff and repeated his charges, and the plaintiff made another attempt to get out of his bargain—he telegraphed the defendants not to ship the horse, that he would not accept him, and that he would see them on a later day he named. This was an attempt at rescission, and, had the defendants concurred, there would have been an end of the matter—but they did not. The horse was shipped, certainly after the telegram was delivered, but also (McIntyre says) after all arrangements had been made for shipping him. The horse was shipped on the 16th February to Mount Forest, in charge of one Winslow (in the defendants' employ), who informed the plaintiff that the horse was in Mount Forest, and who (McIntyre says) "left the horse at the hotel for him."

The plaintiff went down to Mount Forest the next day, the

17th February, and he and McIntyre met—the following took place:—

“He asked me what was the reason I didn’t accept the horse. I said he was not what he was represented to me to be, and I said to him not to ship him.

“Q. Did you tell him what reports you had heard? A. Yes.

“Q. Now, tell us what you did hear? A. I told him Bender said he was around through the township of Wallace, and had not found any mares in foal to the horse, and that he was known as ‘the lame horse.’

“Q. Now, what else did you repeat to Mr. McIntyre? A. I think that is all I repeated to him that day.

“Q. What answer did he make to that? A. He said he would still stick to what he had said before, that he would guarantee him a sound horse; that he was sound and right every way, and that he would give me a veterinary certificate, and that he would go still further; he would give me \$1,000 if he was not as represented to be, and he asked me who my lawyer was.”

They went to the lawyer’s office—there is great variance in the several accounts as to what took place there, but all agree on the important points—McIntyre offered a written warranty, which did not include a warranty of soundness, the plaintiff refused to accept it, and left the conference.

This was an attempt on the part of the defendants to substitute a new contract for the old one by way of accord and satisfaction, but the plaintiff did not consent, and it takes two to make a bargain.

The defendants sent up another man, Anderson, to look after the horse; he asked the plaintiff to accept the horse; the plaintiff refused; Anderson then said that the horse was there at the plaintiff’s expense, and that the plaintiff might as well take him home; the plaintiff refused, but, after thinking the matter over, came down on the 22nd February and allowed Anderson to take the horse to his (plaintiff’s) place, to save expense.

To put this in plain English, the defendants attempted to substitute a new contract for the old one and failed; the plaintiff, seeing that they were insisting on an existing contract, reluctantly submitted to the situation—and the original contract was in no way modified.

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On the 24th or 25th February, the plaintiff noticed that the horse was lame, and told McIntyre so—McIntyre made no reply except to ask what kind of a stable he was kept in—but again reiterated that he was going after Bender for his falsehoods. The horse got no better, and, after another fruitless communication, the plaintiff on the 3rd March, 1915, wrote the defendants that the horse is lame on his front feet already, asked how he would be if put on the road, and said, "I think, if he gets no better, I will advertise him and put him up at public auction." The other defendant, Gabel, then came to the plaintiff's place, and insisted that the horse had good feet (though it was even then lame)—Gabel contended that the floor of the stable was in fault because of concreté (though it was well bedded with straw). Gabel said to the plaintiff that he had signed the notes and had to keep the horse. The plaintiff had the horse examined by two veterinary surgeons, who both swear that he was suffering from "seedy toe"—a "diseased foot"—that he was "unsound, not a sound horse"—"never knew a case to get better that I could say that it was permanently sound"—"it was unsound"—these are some of the expressions used.

The horse was advertised for sale, and sold for \$400—thereafter the purchaser put him up five or six times at the plaintiff's place, and he was lame pretty near every time he was there.

This action was brought, as has already been said.

It seems to me clear beyond any question that the original contract is still in existence, and I should not have thought it necessary to discuss the matter at all were it not that a contrary conclusion was urged on us with impressive earnestness, at great length, and in much detail.

The case of *Head v. Tattersall*, L.R. 7 Ex. 7, is relied upon by the defendants. It seems to me, however, that, rightly considered, it is an authority against them. There the plaintiff bought at Tattersall's a horse which had been described as having hunted with certain hounds—he was informed by a groom, before taking away the horse, that that was a mistake, and it was argued that this notice, followed by the plaintiff's taking away the horse, prevented the plaintiff relying upon the representation. There was there a condition in the sale that in case the horse did not answer the description he was to be returned on the Wednesday following—the Court held that this notice did not deprive the

plaintiff of the right to insist on the condition. Kelly, C.B., says (p. 10): "I do not think . . . that this bound the plaintiff to return it immediately. . . . He had till the Wednesday evening to consider whether he would keep it or not, to make further inquiries, if he thought fit, as to the truth of what he had heard, and to come to a final conclusion," i.e., the original bargain remained in full force. Bramwell, B. (p. 11): "He had no notice when he bought the animal, and so acquired a right to take it away and keep it until the time named in the special condition. This right was not, in my opinion, affected by the information he obtained from the gossip of the owner's groom. . . . The fact of the notice, such as it was, preceding the actual removal, seems to me to make no difference." Cleasby, B. (p. 13): "By taking the horse away he did no more than, under his contract, he had a right to do. . . . I think the plaintiff was still at liberty to take the horse away and to return it, if, upon further inquiry, it should turn out not to be in accordance with the warranty." The learned Barons say that if, before the horse was taken away, the plaintiff had had distinct notice that the warranty was a mistake, the case might perhaps (Cleasby, B.) or would (Bramwell, B.) be different. So, in the present case, if the plaintiff had been distinctly told that the horse was unsound, his taking the horse away thereafter might be considered a waiver of the warranty, but there is nothing of the kind pretended or proved.

It is indeed made manifest that the defendant McLutye refused to give a written warranty of soundness; and, if the real cause of action were the omission or refusal to give a written warranty, an argument might well be based on the facts. But there is no case made out of damages arising from the refusal to give a written warranty—and the real cause of action is on the warranty of soundness implied and necessarily implied in the agreement to give a written warranty. When a person agrees to give a written warranty of soundness, he necessarily (1) asserts that the animal is sound, and (2) promises to give his assurance in writing.

It is a matter of no importance whether the warranty is actually reduced to writing—Equity looks upon that as done which should have been done.

Then it is argued that, on the admitted facts, the horse's malady could not be held to be an unsoundness. It is said that the

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fons et origo mali is a characteristic formation of the foot, a malformation, and that malformation is not unsoundness.

For this are cited *Dickinson v. Follett*, 1 Moo. & Rob. 299, and like cases. Alderson, J., in the *Dickinson* case, says (p. 300): "The horse could not be considered unsound in law, merely from badness of shape. As long as he was uninjured, he must be considered sound." No doubt; and, just as we should not consider a man with bandy legs unsound simply for that reason, so we should not consider a horse unsound simply because it had badly shaped feet. But if in either case disease resulted from the malformation, the man or horse would not be the less unsound because the disease had such an origin.

Whether an abnormal condition constitutes an "unsoundness" must depend largely upon the ordinary use of the word, and the opinion of experts—there is nowhere any decision indicating that what was found here is not an unsoundness. Oliphant's definition is perhaps as good as any other—Oliphant's *Law of Horses*, 5th ed., p. 63.

And while, of course, the unsoundness, to give an action on the warranty, must be existent at the time of sale, I think there is ample evidence that that was the case here.

It may not be without interest to observe, that while the defendants' contention is that they were not to guarantee soundness, but (as McIntyre says) "I told him he was sound and all right as far as I knew, and I would give him a veterinary certificate when the horse was delivered," the certificate actually furnished was not a certificate of soundness generally, but only for insurance purposes. It reads thus: "I have to-day examined the Clydesdale stallion 'Bonny Earl' for insurance, and consider him a sound and first-class risk." We have no information what degree of soundness (if any) is required for "a sound risk" "for insurance." It may be that horses which are "unsound" for travelling as stallions may be "sound risks" for an insurance company. My judgment, however, does not proceed on that ground.

The appeal should be dismissed with costs.

[IN CHAMBERS.]

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Dec. 24.

REX v. JOHNSON.

Criminal Law—Keeping Common Betting-house—Criminal Code, secs. 227, 228—Police Magistrate's Conviction—Evidence to Sustain—Betting-slips, Money, and Bank-books Found on Premises—Forfeiture of Money.

A motion to quash a Police Magistrate's conviction of the defendant for unlawfully keeping a common betting-house was dismissed, where certain things discovered upon the defendant's person and in his house, when searched by the police under warrant, especially betting-slips, money, and bank-books shewing the deposit by the defendant of large sums of money, afforded more than a scintilla of evidence that the house was opened, kept, and used for the purpose of betting with persons resorting thereto and for the purpose of receiving deposits on bets as consideration for a promise to pay on the events of races: Criminal Code, secs. 227 and 228.

Regina v. Bassett (1884), 10 P.R. 386, distinguished.

Reynolds v. Agar (1906), 70 J.P. 568, *Regina v. Worton*, [1895] 1 Q.B. 227, and *Rex v. Corrie* (1904), 68 J.P. 294, specially referred to.

The forfeiture of the moneys seized upon the defendant's premises was affirmed, as well as the conviction.

MOTION to quash a conviction of the defendant, by the Police Magistrate for the City of Hamilton, for keeping a common gaming-house or common betting-house.

December 17. The motion was heard by BORD, C., in Chambers.

C. W. Bell, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

December 24. BORD, C.:—The usual methods by law permitted and prescribed were followed in this case. The police had an eye on this house, 126 James street north, in Hamilton, used and occupied by the defendant as a cigar-store and barber-shop combined, until the Chief Constable was able to swear that he had good grounds for believing and did believe that the house was kept or used as a "common betting-house." Thereon a search-warrant was obtained and the premises "raided" on the 27th November by the police; and the officers found on the person of the defendant 92 slips of paper, with words, names, and figures written on them, and \$232 in bills. In his vest-pocket were next found 3 more slips and \$3 in money; and from another pocket was taken a parcel of "dead" slips. There were also found in his trunk five savings bank books in different banks. At the gaol was found concealed on the person of the defendant a further sum in bills of \$690.

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The bank books shew moneys on hand to the credit of the depositor up to date as follows: \$3,189 (Hamilton); \$1,500 (Union); \$3,487 (Molsons); \$9,119 (Nova Scotia); and \$8,256 (Montreal).

After the first haul was made downstairs, the Deputy Chief spoke of going up to the bed-room, and Johnson (the defendant) said: "You have enough there, you have all you want there in that pile;" or, as related by another witness: "No; you have got all the evidence you want." Nothing was found upstairs except some little slips. On his way to the station, the prisoner said, "I have been too long in the game." The earliest date in the bank books is October, 1912, in the Molsons Bank. The slips were "betting-slips," as proved by the police.

Upon this evidence and these productions, the magistrate convicted the defendant of unlawfully keeping a common betting-house in the building aforesaid.

The application is now made to quash the conviction for want of evidence. The prisoner himself gives no testimony under oath, and so there is no manner of explanation, from any one who knows, as to the two salient facts of the case: the multitude of betting-slips and the thousands of dollars deposited month after month, and frequently week after week, for these years, besides the large sum of money in his hands when arrested, amounting in all to over \$900. It is an easy inference to connect the two as shewing one outcome of his betting transactions.

Two main purposes are specified in the Criminal Code, secs. 227 and 228,* as to be prohibited: first, keeping a house for the

*227. A common betting-house is a house, office, room or other place,—

(a) Opened, kept or used for the purpose of betting between persons resorting thereto and

(i) The owner, occupier or keeper thereof,

(ii) Any person using the same,

(iii) Any person procured or employed by, or acting for or on behalf of any such person,

(iv) Any person having the care or management, or in any manner conducting the business thereof; or,

(b) Opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

(i) For any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game or sport, or

(ii) For securing the paying or giving by some other person of any money or valuable thing on any such event or contingency; or

(c) Opened, or kept for the purpose of recording or registering bets upon any contingency or event, horse race or other race, fight, game or sport, or for the purpose of receiving money or other things of value to be transmitted

purpose of betting with persons resorting thereto; and, next, keeping it for the purpose of receiving deposits on bets as consideration for a promise to pay on the event of the race. There is evidence on both heads, which, had the prosecution proceeded by indictment, could have formed the basis of accusation by the grand jury, and which, if left unexplained by the defence, could have been submitted as *primâ facie* evidence of the character of the house as kept by the accused, upon which a verdict of "guilty" might pass. As put by Darling, J., in a like case, though there was no actual evidence of people attending to bet or to make deposits, yet the Justice might properly conclude that they did so: *Reynolds v. Agar* (1906), 70 J.P. 568 (journal part).

The examination of the betting-slips, coming from the defendant's possession, affords the most cogent evidence of betting transactions on a large scale, though some of the amounts may be small. The statute not only forbids bets being made by the keeper or occupier of the house, but also bets made through him with others who resort there for that purpose. As pieces of evidence, these slips shew bets taken in which the defendant is an actor, and it is immaterial whether the defendant should be responsible for the payment of the bet or whether it was to be made through him as acting for another not named or known. Presumably he was the principal in the different transactions disclosed in the slips. These betting-slips are of various contents in details, but all shew the names of the horses and how much is bet on the race and the name or initials of the person making the

for the purpose of being wagered upon any such contingency or event, horse race or other race, fight, game or sport, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; or,

(d) Opened, kept or used for the purpose of facilitating or encouraging or assisting in the making of bets upon any contingency or event, horse race or other race, fight, game or sport, by announcing the betting upon, or announcing or displaying the results of, horse races or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse race or other race, fight, game or sport occurs or takes place in Canada or elsewhere.

228. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as herein-before defined.

2. Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof.

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bet. In many cases, the amount paid or deposited appears, and some shew how much has been paid on the bet by the defendant, and again a note of how much is owing.

For instance, one slip reads thus on its face:—

Humiliation.....	50	0	0
Any Come.			
Borgo.....	50	50	50
Belamaire.....	50	50	50
Irene & Billy Limited.			

And on the back is written: "Will pay you 2 bucks and owe you next week. Irene X."

The large moneys deposited by the defendant could not have been derived from the smokes and shaves, but represent large betting transactions carried on at his place in James Street. That, at all events, is a fair and reasonable inference which a jury might make. The importance and significance of these slips is shewn by many cases, among which I may note: *Regina v. Worton*, [1895] 1 Q.B. 227; *Wyton's Case* (1910), 5 Cr. App. Cas. 287; *Mortimer's Case* (1910), *ib.* 199, at p. 200; and *Lester v. Quedsted* (1901), 20 Cox C.C. 66.

Most of the slips give three sets of figures after the name of the horse, indicating what is put up in case the horse comes in first or second or third in the race. Another is set down thus: "Black Sheep \$1.00 to win;" and so as to 12 other horses named, and signed "Lane." Others have noted on the face or endorsed the money paid or deposited at the time. This is called in the cases "Ready-money betting." One slip in yellow, signed "A. I.," puts 1. O. O. on T. McTaggart's mount, 2nd race, and same on his mount, 5th race, and same on his mount, 1st race, and at the end 4.95 is marked as deposit.

On one slip (initialled "A. M.," betting on 4 horses) is endorsed, "\$1.00 received wrapped in this paper." This is precisely the *modus operandi* described in *Regina v. Worton, ubi supra*. Many of the slips used are of the same shape, size, colour, and material as this one.

These various indications have a cumulative effect, and carry the charge beyond one of suspicion into something properly evidential; and, though to some the evidence may appear slight, it is more than a mere *scintilla*, and cannot be withdrawn from

judicial consideration. In this it differs from the case cited, *Regina v. Bassett* (1884), 10 P.R. 386, and is more in line with the case cited by Mr. Cartwright, where some slight evidence was given pointing towards guilt: *Rex v. Corrie* (1904), 68 J.P. 294. The Court thought that it lay upon the defendant, if he could, to make some explanation, if he wished to escape the consequences of what had been proved. It is analogous to the case of stolen goods being found in the premises of one who, to extricate himself, should shew how he came honestly by them. See also *Lee v. Taylor* (1912), 107 L.T.R. 682.

Upon the whole circumstances and evidence the Police Magistrate has passed, and has found the defendant guilty. I am not disposed to interfere with this result, and the conviction stands affirmed, as well as the forfeiture of the money seized (i.e., excluding what was discovered in the gaol.)

[APPELLATE DIVISION.]

BROWN V. COLEMAN DEVELOPMENT CO.

Statute of Frauds—Moneys Advanced by Director of Company—Oral Promise of President to Repay—Evidence—Nature of Contract.

The decision of MIDDLETON, J., 34 O.L.R. 210, was reversed, and it was held, that the promise made by the defendant G. to repay to the plaintiff moneys advanced by the latter for the benefit of the defendant company, was an express contract of G.'s own and only his own, and was not a promise to answer the debt of the company so as to let in the Statute of Frauds.

Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, applied and followed.

APPEAL by the plaintiff from an order of MIDDLETON, J., of the 25th June, 1915, in the Weekly Court, allowing an appeal by the defendant Gillies from the report of an Official Referee. See 34 O.L.R. 210.

November 17. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. M. Douglas, K.C., and S. W. McKeown, for the appellant, argued that there was no contract of suretyship, but that the debt was a direct liability of Gillies to the plaintiff. Therefore the Statute of Frauds had no application. The fact that the company benefited made no difference: *Thomas v. Cook* (1828),

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8 B. & C. 728; *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885; *Lakeman v. Mountstephen* (1847), L.R. 7 H.L. 17.

H. S. White, for the defendant Gillies, respondent, relied upon the judgment appealed from and the cases cited in the reasons for judgment. The contract was one of suretyship, the promise of Gillies being a promise to answer for the debt of the company, and so the Statute of Frauds afforded a defence. The appellant had rendered his account to the company, shewing that he looked to the company for payment.

Douglas, in reply, contended that the rendering of the account to the company did not prevent the plaintiff from succeeding against the respondent.

December 29. RIDDELL, J.:—An appeal from the judgment of Mr. Justice Middleton, 34 O.L.R. 210.

I accept the findings of my learned brother, so far as they set out the facts out of which the alleged contract arose, and the terms in which the said contract is expressed—and indeed the learned Judge is “unable to interfere with the findings of fact which has been arrived at by the Referee.”

But I find myself unable to agree with the conclusion that the promise undoubtedly made was one made by Gillies to answer the debt of the company so as to let in the Statute of Frauds.

The promise was, “You advance this money and I will return it to you:” and this, as it seems to me, was an express contract of Gillies’ own and only his own. It is of no importance that some third person, corporation or otherwise, has the advantage of the advance: *Thomas v. Cook*, 8 B. & C. 728; *Wildes v. Dudlow* (1874), L.R. 19 Eq. 198; *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885 (C.A.); *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17.

In this last case, Mountstephen had a contract with the board of health of a town, but was not inclined to perform a necessary part of it; Lakeman, the chairman of the board, said to him, “Go on and do the work and I will see you paid;” the Court of Queen’s Bench held that this could only be a promise to pay if the board did not: *Mountstephen v. Lakeman* (1870), L.R. 5 Q.B. 613. On appeal, the Exchequer Chamber held that there was evidence that the chairman had made himself primarily liable: *Mountstephen v. Lakeman* (1871), L.R. 7 Q.B. 196. The defendant

appealed to the House of Lords; the appeal was dismissed. The leading judgment was given by the Lord Chancellor (Lord Cairns), who thought the *primâ facie* and natural meaning of the words was, that the contractor was to go on and do the work, not troubling himself about the board, and the chairman would pay. Lord Selborne goes further and says that there is not a particle of evidence from which the House "ought to conclude that the board was actually liable" (p. 26). The present case, as it seems to me, is *â fortiori*.

It is argued that the plaintiff rendered his account to the company—but the same thing took place in the *Lakeman* case, L.R. 5 Q.B. 613, at p. 615; and the subsequent transactions between the parties here are, to say the least, as favourable to the plaintiff's as to the defendant's contention.

I would allow the appeal with costs, and reinstate the Referee's finding with costs before the Weekly Court.

LATCHFORD, J.:—The learned Judge appealed from found himself unable to interfere with the finding of fact arrived at, upon contradictory testimony, by the Referee—that the advance made by the plaintiff was an advance to Gillies, and not to the company. Yet because Brown afterwards, in an account rendered to the defendant, included the amount of such advance, \$9,247, with what he claimed to be due him for salary, and subsequently agreed to accept \$7,000 from the company in consideration of releasing the company and Gillies from any claim which he had against them, the conclusion was reached that the promise made by Gillies was in truth a promise to answer for the debt of another—the company—and, therefore, within the Statute of Frauds.

With great respect, I find myself unable to agree in the judgment appealed from. In rendering the account and making the subsequent agreement, Brown did not release Gillies from the liability attaching to the original agreement as found—"Advance this money and I will repay you." It was a matter of indifference to Brown whether the moneys were repaid by Gillies or by the company. When the company did not pay the reduced claim of \$7,000, in consideration of which payment Brown was to release, not only the company, but Gillies, the original liability of Gillies, whatever it was, remained unimpaired.

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That liability, according to the finding, was to repay Brow the amount which he was requested by Gillies to pay out on behalf of the company.

It was a direct primary liability of Gillies to Brown. The statute has no application to such a case.

I therefore think the appeal should be allowed with costs here and below.

KELLY, J.:—In the form this matter has assumed, the crucial question is, whether there was or was not original liability on the part of the respondent (Gillies) to pay the appellant the money he advanced. That there exists a liability of some one to the appellant, to the extent of \$7,000 and interest, both the Referee and my brother Middleton, to whom an appeal was taken from the Referee's judgment, agree; the former finding that the respondent made himself primarily liable, while the latter's view is that the promise made was in truth a promise to answer for the debt of the defendant company (which he finds liable to the appellant); and, it not being in writing, the Statute of Frauds affords a defence to the promisor. My brother Middleton finds himself unable to interfere with the Referee's findings of fact. On these facts the case must be determined.

As I read the evidence, the respondent's promise was, not to pay the company's debt, but to repay the appellant's advances made on the company's account or for the company's benefit at the respondent's request and on his promise to return the money. His later promises and admissions are corroborative of this view. That it was the company that was deriving immediate benefit from these advances is not of itself conclusive of a debt due by it; nor does that circumstance exclude original liability by the respondent any more than in *Lakeman v. Mountstephen*, L.R. 7 H.L. 17, the fact that the local board of health, of which Lakeman was the chairman, benefited from the work done by Mountstephen, absolved the former from original liability. The form of promise here was that if the appellant would advance the money "and keep the thing alive" (that is, money to the workmen to keep the operations of the company going), he (the respondent) had moneys coming in and would return it to him. This language is not more indicative of a promise to pay the debt of another, in the event of that other's default, than was the promise made in

the *Lakeman* case: "Go on and do the work" (for the benefit of the local board) "and I will see you paid."

The one arguable circumstance throwing any doubt on the respondent's original liability was, that the appellant rendered his account to the company, including in it a claim for wages, admittedly the company's debt, and that in the action he made the company a defendant as well as the respondent. That, however, is not necessarily a bar to his right to succeed against the latter, unless it can be deduced, *aliunde*, either that the promise was to pay not his own debt but that of the company in the event of its default, or that he abandoned his right to hold the respondent to personal liability on what I think was an express promise to pay his own obligation, contracted, as the Referee has found, as a debtor to whom the appellant gave credit. In the *Lakeman* case, while the contractor did the work on the order given him by the chairman of the board, and under the superintendence of the surveyor of the board, he sent in his account therefor to the board, debiting them with the amount; and when almost three years had elapsed and the board had not paid, he then for the first time applied to the chairman personally for payment; and in the final result of his action to enforce this claim against the chairman he succeeded.

After careful consideration of the evidence to ascertain the real effect of the respondent's promise, I am not able to say that the Referee's conclusions were not correct; and my opinion is, that the order appealed from should be set aside and the judgment of the Referee restored, with costs.

FALCONBRIDGE, C.J.K.B.:—I agree with the result arrived at by all my brothers.

The appeal will be allowed, and the Referee's finding reinstated, with costs here and below.

Appeal allowed.

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RE GRAMM MOTOR TRUCK CO. OF CANADA AND BENNETT.

Company—Shareholder—Summary Application for Removal of Name from Register—Companies Act, R.S.O. 1914, ch. 178, secs. 118, 119, 121—Agreement to Take Shares—Payment not Made—Election by Conduct to Become and Remain Shareholder.

An application by G., a shareholder of an incorporated company, in his own name and that of the company, for an order directing the removal of the name of B. from the register of shareholders (see secs. 118, 119, and 121 of the Ontario Companies Act, R.S.O. 1914, ch. 178), was refused by a Judge, and his refusal was affirmed by the appellate Court; it being held, that these sections are not to be invoked except in a reasonably clear case. The opinion of the majority of the Court was, that B. was, by agreement with the company, bound to pay at least par for the shares which stood in his name; and that he was none the less a shareholder because he had not yet paid, the price to be paid not having been settled.

Per HODGINS, J.A.:—B. chose to allow his name to be put upon the register, to qualify as director and vice-president upon them, to vote on them, and to take an active part in the company's affairs, before the shares standing in his name could be legally issued as paid-up shares; and he thereby elected to take them with the liability properly attaching to them. An actual subscription was not required, nor was formal allotment. He became a shareholder by allowing his name to remain on the register and by acting as owner of the shares.

Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor (1915), 34 O.L.R. 161, followed.

The appeal was dismissed with costs; HODGINS, J.A., dissenting as to costs only.

MOTION by one Galusha, in his own name and that of the above-named company, as applicants, for an order under secs. 118, 119, and 121 of the Companies Act, R.S.O. 1914, ch. 178*, for

*118. The corporation shall cause the secretary, or some other officer specially charged with that duty, to keep a book or books wherein shall be kept recorded:—

(a) A copy of the letters patent and of any supplementary letters patent issued to the corporation and, if incorporated by special Act, a copy of such Act, and the by-laws of the corporation duly authenticated;

(b) The names, alphabetically arranged, of all persons who are or who have been shareholders or members of the corporation;

(c) The post office address and calling of every such person while such shareholder or member;

(d) The names, post office addresses and callings of all persons who are or have been directors of the corporation, with the date at which each person became or ceased to be such director;

And in the case of a corporation having share capital—

(e) The number of shares held by each shareholder;

(f) The amounts paid in, and remaining unpaid respectively, on the shares of each shareholder;

(g) The date and other particulars of all transfers of shares in their order.

119.—(1) The books mentioned in the next preceding section and in section 124, shall be kept at the head office of the corporation within Ontario, whether the company is permitted to hold its meetings out of Ontario or not.

(2) Any director, officer or employee of a corporation who removes or

a mandatory order directing the removal of the name of William M. Bennett from the register of shareholders of the company.

November 16, 1914. The motion was heard by LATCHFORD, J., in the Weekly Court at Toronto.

A. C. Heighington, for the applicants.

H. E. Rose, K.C., and *J. W. Pickup*, for the respondent.

LATCHFORD, J. (at the conclusion of the argument):—In this motion Galusha seeks to have the name of Bennett struck from the books of the Gramm Motor Truck Company of Canada, on the ground that it has been placed there improperly. Bennett, it would appear, agreed to subscribe for 199 shares in the company, at a valuation to be made by a firm of accountants in Detroit. Shortly afterwards, an action was begun by Galusha against Bennett, on the ground that the agreement contemplated the sale of the stock to Bennett at less than its par value. Probably as a result of these proceedings, a meeting was held on the 15th May,

assists in removing such books from Ontario or who otherwise contravenes the provisions of this section shall incur a penalty of \$200.

(3) Upon necessity therefor being shewn and adequate assurance given that such books may be inspected within Ontario by any person entitled thereto after application for such inspection to the Provincial Secretary the Lieutenant-Governor in Council may relieve any corporation permitted to hold its meetings out of Ontario from the provisions of this section upon such terms as he may see fit.

121.—(1) If the name of any person is, without sufficient cause, entered in or omitted from any such book, or if default is made or unnecessary delay takes place in entering therein the fact of any person having ceased to be a shareholder or member of the corporation, the person or shareholder or member aggrieved, or any shareholder or member of the corporation, or the corporation itself, may apply to the Supreme Court, for an order that the book or books be rectified, and the Court may either refuse such application or may make an order for the rectification of the book, and may direct the corporation to pay any damages the party aggrieved may have sustained.

(2) The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from such books, whether such question arises between two or more shareholders, or alleged shareholders, or members, or between any shareholder or alleged shareholder or member and the corporation, and the Court may in any such proceeding decide any question which it may be necessary or expedient to decide for the rectification of the books.

(3) The Court may direct an issue to be tried.

(4) An appeal shall lie from the decision of the Court as if the same had been given in an action.

(5) This section shall not deprive any Court of any jurisdiction it may otherwise have.

(6) The costs of any proceeding under this section shall be in the discretion of the Court.

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1914, at which it was agreed that the amount which Bennett should pay was not to be less than par. A valuation of the assets was subsequently made, but not by the firm of accountants mentioned in the first agreement with Bennett. The valuation shews a surplus of about \$12,000.

Among the assets mentioned is a claim, estimated at \$34,000, which the Canadian company had against the parent company at Lima, Ohio, and which at the time was in litigation. It appears that a judgment was obtained in these proceedings, not for \$34,000, but for about \$13,000, and that the Lima company is now appealing against that judgment, while there is no cross-appeal by the Canadian company, and therefore no likelihood that the amount will be increased. Instead, therefore, of a surplus existing according to the valuation made, there will be a deficit of about \$9,000.

It is therefore argued that Bennett will necessarily pay less than par for his shares.

I cannot accept this contention. The valuation under which Bennett was to pay for the shares for which he subscribed has not yet been made, and in any case he is to pay par or over.

I do not think an order should be made under the sections quoted, except in a very clear case. All the cases cited, and others which might be cited, are cases where it was clear that the register should be rectified because shares were issued by the companies when they had no right to issue them. Such was the fact in the cases cited to me.

I think the application fails, as it should be clearly established that the name of Bennett is on the books of the company without sufficient cause. That has not been established; and the motion is dismissed with costs.

The applicants appealed from the order of LATCHFORD, J.

March 1 and 11 and November 15, 1915. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., RIDDELL and KELLY, JJ.

A. C. Heighington, for the appellants.

H. E. Rose, K.C., and *J. W. Pickup*, for Bennett, the respondent.

The arguments of counsel are sufficiently stated in the judgments.

December 31. RIDDELL, J.:—This is an appeal from an order made by my brother Latchford; the appeal was fully argued several months ago—for certain public reasons we reserved our judgment, and a further delay has arisen from a misunderstanding between the officers of the Court. It is now, however, ripe for decision.

The order appealed from is a refusal to accede to the prayer ostensibly of the Gramm Motor Truck Company of Canada and one Galusha—in fact there is a controversy concerning the constitution and control of the company, and the application is by Galusha. It is for an order under secs. 118 and 119 of the Companies Act, R.S.O. 1914, ch. 178.

The facts are correctly set out by the learned Judge—I entirely agree with him that, in the result, Bennett is obligated to pay at least par for the stock, and that there can be no objection to him on that account.

That he has not paid for the stock is no reason for saying he is not a shareholder—it may be that the company can sue or can be compelled to sue for the purchase-price—but that is not the present proceeding.

I think the appeal fails and must be dismissed with costs.

This dismissal will be without prejudice to any action the applicants or either of them may bring for a declaration that Bennett is not a shareholder—all the facts may not be before us, and many of the allegations are contentious. I entirely agree with my brother Latchford that the sections in question are not to be invoked except in a reasonably clear case.

I am not to be understood as expressing any doubt that the respondent is a shareholder in the company—I have no such doubt, on the material before us.

FALCONBRIDGE, C.J.K.B.:—I agree.

KELLY, J.:—The order appealed from refused an application to have the name of the respondent, William M. Bennett, removed from the books of the Gramm Motor Truck Company of Canada Limited, if it was “contained therein as a stockholder and officer.”

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The application is expressed to be made under secs. 118 and 119 of the Ontario Companies Act, R.S.O. 1914, ch. 178. Section 121 should also be referred to.

On the material before us, in which there is much contradiction, it cannot be truthfully said that the contention that Bennett's name is properly on the list of shareholders is without foundation. He agreed to subscribe for stock and to pay for it when its price was ascertained by the method prescribed by the agreement; and afterwards he acted in the capacity of shareholder and director and vice-president of the company.

The order asked for should not be summarily granted except in cases where it is made clear that the name objected to has been, without sufficient cause, entered, or retained, upon the list of shareholders. The present is not such a case; and I do not think it necessary to go further than to say that the application, on the controversial evidence submitted, was quite properly refused.

The order appealed from should not be disturbed; the appellant should pay the costs of the appeal.

HODGINS, J.A.:—Appeal from an order refusing a motion to remove the name of William M. Bennett from the register of stockholders of the Gramm Motor Truck Company of Canada, as the holder of 199 shares.

These shares were the subject of an agreement dated the 9th July, 1913, between Bennett, the company, and Acason and Galusha. The latter, a shareholder, is an applicant here together with the company.

Bennett agreed "to subscribe for 199 shares of preferred capital stock of the above-named company, to be paid for by him at the actual value of the said shares, at a time hereinafter mentioned, when a valuation is made of said shares. Said value to be determined by a proper taking of stock and valuation of the assets and liabilities of the said company by the firm of McPherson Weiss & Company, auditors, Detroit."

Provision was made for the basis of valuation, which was to be the actual value outside the goodwill, etc., which was fixed at \$30,000. The audit and valuation were, it was agreed, to be postponed until after the litigation with the Gramm Company

of Ohio, U.S.A., was settled, but were to take place "before said stock subscribed for is paid."

The shares were to be "issued as fully paid-up shares, and be preference shares in accordance with the by-laws of the company creating same, and the said party of the first part shall be entitled to all the benefits pertaining to said shares."

There was to be a transfer by Bennett of certain patent rights which the company agreed to purchase and to pay for by the issue of common stock to the value of \$10,500. (These shares have not appeared in his name, so far as the material filed goes.)

Acason and Galusha then covenanted to cause the said Bennett to be elected a director and to be made vice-president, "as long as he retains his shares of stock in the company."

Bennett agreed to give his entire time and talents to the business of the company for a salary of not less than \$3,600 per annum, payable monthly.

The last clause of the agreement is as follows: "The said shares of stock subscribed for by the party of the first part shall be, when issued to him, his absolute property without any conditions attached except what are provided for in the by-laws of the company. And it is agreed that all necessary steps shall be taken and all things done by all parties hereto to put into operation immediately all terms and conditions of this agreement, excepting that part which provides for the valuation of said 199 shares of stock, when the matters in litigation between the before-mentioned companies have been finally settled, and except also that said party of the first part shall have sufficient time to complete any details and matters now pending between himself and the International Electromotive Company before the obligations herein contained become effective, in so far as anything in this agreement is concerned which may be affected by the matters between himself and said company."

It is to be noted: (1) that Bennett does not actually subscribe, but agrees to subscribe; (2) payment is to be made on the basis of actual value, after a valuation by a firm of Detroit auditors, which valuation is postponed until after certain litigation is ended; (3) that the shares are to be issued as paid-up shares; (4) that the shares, when issued, become his absolute property without any conditions attached; (5) that he is to be elected a director and made

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vice-president as long as he retains his shares, which may refer to common stock only or both kinds; (6) that he agrees to devote himself to the company's business and get a yearly salary for it; (7) that the obligations in the agreement become effective, in so far as they are affected by any matters between Bennett and the International Electromotive Company, after he has had sufficient time to complete them.

I should read this agreement as indicating that Bennett would subscribe for paid-up shares when their value was ascertained, as provided; that value being all that Bennett would have to pay.

On the 15th May, 1914, a further agreement was made, to which Bennett, the company, and Acason were parties, which contains the following clauses:—

“Now it is declared and agreed that it was the understanding of the parties to the said agreement, that the said Bennett should, in any event, pay not less than par for the said shares subscribed for by him as aforesaid, and in confirmation thereof, and to settle any doubt as to his liability, the said Bennett hereby covenants and agrees with the company that the price to be paid by him as aforesaid for the said stock shall be not less than the par value thereof.

“And it is further declared and agreed that the holder of the said stock shall be entitled to dividends from time to time in respect thereof, calculated upon the amount which shall have been paid by the said Bennett on account of his said subscription.”

If Bennett had adhered to the terms of these agreements, it is clear that, till the value was ascertained, he was not bound to subscribe for the shares nor to pay for them, and in the meantime he would not be a shareholder.

But he did not do so. He seems to have decided to become a shareholder, holding these 199 shares, payment for which would not be due till their value was ascertained; and, consequently, his name appears as the holder of these 199 shares in the company's books. He acted as director from July, 1913, as he might do if he held shares and was not in arrear for any payment due on them, as was the case here, for the price had never been settled. He was twice elected director and vice-president, and acted as such for about two years. He voted on these shares more than once. The affidavits filed shew that he did this with the full knowledge

and consent of the directors and shareholders, so far as they were consulted.

Upon the authority of *Morrisburgh and Ottawa Electric R. W. Co. v. O'Connor* (1915), 34 O.L.R. 161, he became a shareholder in respect to these 199 shares, by reason of allowing his name to remain on the register and by acting as owner of them. An actual subscription is not required, nor is formal allotment. Conduct may take the place of both. Crocker, one of the directors, however, in his affidavit speaks of these 199 shares as having been allotted to Bennett.

He had the right under his agreement to refuse to accept anything but paid-up shares, and to refuse to pay for them till their value was ascertained in the way provided. The time arrived for that ascertainment on the 15th March, 1915, when the litigation between the company and the Ohio company was terminated: *Gramm Motor Truck Co. of Canada Limited v. Gramm Motor Truck Co. of Lima Ohio* (1915), 8 O.W.N. 121.

But, if he chose, as he undoubtedly did, to allow his name to be put upon the register, to qualify as director and vice-president upon them, to vote on them, and to take an active part in the company's affairs, before they could be legally issued as paid-up shares, he elected to take them with the liability properly attaching to them.

This is the effect of such cases as *In re Railway Time Tables Publishing Co.* (1889), 42 Ch.D. 98; *Re Wiarton Beet Sugar Co., Jarvis's Case* (1905), 5 O.W.R. 542; and *Re Modern House Manufacturing Co.* (1913), 29 O.L.R. 266.

The shares were always intended to be shares paid-up in money by Bennett when the value was ascertained. In acting as he did he became a shareholder *in præsentia*, but no alteration was made in his contract to pay, which remains as it was. The only difference is, that he became a shareholder, instead of remaining only an intending one.

I think this disposes of the application adversely to the applicant, and leaves Bennett as properly upon the shareholders' register, and liable for the amount unpaid upon the shares in accordance with his contract. He covenanted to pay at least par for them, and that is exactly the amount for which the company could properly issue shares.

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Various questions may arise later on, such as whether it was Bennett's duty or that of the company to have the value ascertained, and whether the then or present directors have neglected or are neglecting their duty of requiring payment for these shares, and in any event whether, if no valuation can be had by the named firm, the principle laid down in *Cameron v. Cuddy*, [1914] A.C. 651, applies. This Court has at present nothing to do with them, although this decision will have some effect in their consideration.

I cannot part with the case, in view of the affidavits filed subsequent to March, 1915, without remarking that, if the Court had been properly informed of the real position of affairs on the 11th March, 1915, when the case was argued, the decision would not have been delayed until now. Evidently from what transpired in April, 1915, there was no real obstacle in the way, and the reasons put forward in March were unsubstantial. Counsel, no doubt, acted on their clients' instructions, but those instructions were not in accordance with the real situation. For these reasons, while the judgment should be affirmed upon grounds different from those appearing in the reasons given, there should be no costs of this appeal.

*Appeal dismissed with costs; HODGINS, J.A.,
dissenting as to costs.*

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[APPELLATE DIVISION.]

Dec. 31.

CAMPAIGNE V. CARVER.

Mechanics' Liens—Claim of Material-man—Erection of "Semi-detached" Houses for Different Owners on Adjoining Lots—Joint Contract or Separate Contracts—Material Furnished for one House within 30 days before Registration of Claim—Failure of Lien as to one Lot—Reduction of Amount as to other—Request and Benefit of Owner—Form of Registered Claim—Validity—Extent of Lien—Percentage of Contract Price—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 2 (c), 6, 12 (1), (2).

The defendants C. and S. were respectively the owners of two adjoining lots; the defendant contractor made an offer in writing, addressed to both of them together, to build a pair of semi-detached houses, one house on each lot, and to do all labour and complete the houses for a named sum for each house. The offer was in fact accepted, but not in writing, and the houses were built:—

Held (RIDDELL, J., dissenting), that it was manifest from the testimony given and the conduct of all the parties concerned, that C. accepted the

tender as to one house, and S. as to the other, so as to constitute, when ratified, as it was, by the contractor, one contract between C. and the contractor for the C. house and another contract between S. and the contractor for the S. house.

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A plumber had a sub-contract for the installation of the plumbing in both houses. The plaintiff furnished to the plumber materials which went into both houses, and claimed a lien therefor against both lots; the registration of his claim of lien was on the 3rd September; no materials furnished for the S. house were supplied within 30 days before the 3rd September, but on the 6th August materials were furnished by the plaintiff which were placed by the plumber in the C. house on the 10th August:—

Held, that the lien, so far as it affected the interest of S. in his lot, utterly failed; and the lien for the full amount claimed also failed as to the C. property—the C. interest could not be made liable for goods not supplied upon the request of C. and not for his direct benefit: Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 2(c) (iv.)

It was a reasonable inference, however, that one-half of the materials was used in each house; and the plaintiff's lien, reduced to one-half the sum claimed, and restricted to the C. property, should prevail.

Per RIDDELL, J.:—(1) The claim of lien was valid, notwithstanding that the two lots were named in one claim and the whole amount was claimed against both; and the certificate of *lis pendens* followed the claim and was equally valid.

(2) The whole structure was “the building,” and not each separate, “semi-detached” half; material furnished for the building, or either part of it, came under sec. 6 of the Act—and both lots were “land occupied thereby.” In this view, the time of delivery of any part of the materials was the same for both lots, and that was sufficiently late to validate the claim.

(3) A person supplying materials is entitled to a lien for his whole account, or for so much thereof as (with due regard to the rights of others *in consimili casu*) can be paid by 20 (or 15) per cent. of the “contract price or actual value:” sec. 12(1), (2).

(4) If there had been a contract by each owner for his own half of the semi-detached structure, it could not be said that either requested the building of the other's house (sec. 2(c)); and, therefore, neither would be liable to a lien on his land for materials furnished for the house of the other; but, in that event, it might well be found that one-half of the materials was furnished for and went into each half of the building, and a lien declared accordingly—the conclusions as to time, quantum, etc., being the same in this view as in the other.

APPEAL by the defendants Carver, Spence, and Castell, from the judgment of His Honour Judge Monek, Local Master at Hamilton, in favour of the plaintiff, a material-man, in his action to enforce his lien against the defendant Carver, the contractor, and the defendants Spence and Castell, the owners respectively of two adjoining lots, upon which the defendant Carver built for them—one for each—a pair of semi-detached houses.

December 3. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

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Gideon Grant, for the appellants, argued that no claim of lien could be declared against either lot, because there were two separate parcels of land, two separate owners, and two separate contracts. There was not a joint contract: *Fairclough v. Smith* (1901), 13 Man. R. 509; *Booth v. Booth* (1902), 3 O.L.R. 294; *Ontario Lime Association v. Grimwood* (1910), 22 O.L.R. 17. The plaintiff's claim, if any, should be limited under sec. 12 of the Act to 20 per cent. of the amount of the lien.

P. R. Morris, for the plaintiff, respondent, contended that the judgment appealed from was right, and that the contract was a joint one between Carver, on the one hand, and Spence and Castell, on the other. Both owners requested the building of both houses, and the lien therefore attached to both lots: *Wallace on Mechanics' Liens*, 2nd ed., p. 18; *Phillips on Mechanics' Liens*, 3rd ed., p. 659. A material-man's lien is not limited to 20 per cent. of his claim. Section 12 of the Act means that he has a lien for the whole amount of his claim, or so much as may fall to his share, among other lien-holders, out of the 20 per cent. to be retained by the party primarily liable, from the contract price.

Grant, in reply.

December 31. LATCHFORD, J.:—The two adjoining parcels of land, on the owners' interest in which the lien for \$168.23 appealed against has been held to attach, were owned, when Carver agreed to erect houses upon them, one by Amelia Castell, and the other by Chester Spence and his wife; and they are still, so far as appears, respectively owned by the same persons.

In a proposition dated the 24th March, 1913, intituled "Tender for pair of houses on Wilson street for Messrs. Spence & Cassels," Carver said: "I will build those houses . . . furnish all material to complete the house (*sic*) for the sum of \$2,467 each. . . ."

On the 11th April, in a document intituled in the same words, Carver modified his original proposition, stating: "The alterations you gave me note of will make a difference of \$37 for each house, which is \$74 for both, which will make \$2,430 for each house."

This tender was given by Carver to Mr. Spence (p. 30), who states (p. 37) that there was no written acceptance of it. Castell says he signed no contract, nor did his wife, so far as he knows. But that it was accepted is uncontested. The question upon which the case turns is, how was it accepted? By Spence and Castell jointly, or by each acting solely for himself? In other words, was it accepted in such a way as to constitute a single contract between Spence and Castell on the one part and Carver on the other for the erection of both houses? Or were two contracts made—one between Spence and Carver for the erection of the house on the Spence lot, and the other between Castell and Carver for the erection of the house on the Castell lot?

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If there was a joint contract, the lien, in my opinion, was properly registered, and attached to the interest of both the owners (I treat the ownership of Castell and his wife as one).

In *Deegan v. Kilpatrick* (1900), 54 App. Div. N.Y. 371, the First Department of the Supreme Court of New York held, under a Lien Act similar to our own, that where two persons, each owning in severalty (as here) one of two adjoining lots, enter into a joint contract for work to be done on both lots, under an agreement treating both lots as one, a mechanic's lien for the work may be filed on both parcels.

With that decision, upon the facts of the case, I entirely agree. Other useful cases may be found collected in *Rockel on Mechanics' Liens* (1909), p. 225.

But the facts here are different. In considering the evidence, it is to be observed that Carver did not require a joint acceptance of his tender. That he might have done so is nothing to the point. It is also well to remember that, while the tender is frequently referred to—especially by the learned Master—as *the contract*, it was in reality but a proposal, the acceptance of which, whether joint or several, was necessary before a contract, or more than one contract, could be constituted.

In one aspect, the tender itself was not severable. The houses were to be semi-detached; divided, but built as one. It is, I think, highly improbable that Carver would, at the tendered price, have built one if he was not at the same time to have the

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building of the other. But this term, plainly enough implied, would be completely satisfied if, with the concurrence of Carver, each of the parties addressed accepted for himself.

It is, in my opinion, manifest, from the testimony given and from the conduct of all the parties concerned, that Spence accepted the tender as to the one house, and Castell as to the other, so as to constitute, when ratified, as it was, by Carver, one contract between Spence and Carver for the Spence house, and another contract between Castell and Carver for the Castell house. There were thus formed between the parties two separate and distinct contracts—not one, as found by the learned Master. So long as Carver had the building of both houses, he was content that each owner should be responsible for the price of the erection of his particular house. That the houses were semi-detached and not entirely separated, and therefore more cheaply constructed, is quite immaterial. The evidence is uncontradicted that there were two contracts—one for each house.

Carver says (p. 23): “I was to go ahead and complete the houses for \$2,430 a piece.

“Q. And that is for which one? A. For both.

“Q. That is altogether or separately? A. Separately.”

Carver knew the houses were on separate properties, one belonging to Spence, and the other to Castell (p. 24).

A bill for the Castell house was sent to Mr. Castell, and he paid it. Each (Castell and Spence) paid separately; each took care of his own contract (p. 25).

Castell, who looked after the paying of the bills for his wife, was asked (p. 31):—

“Q. And what was the contract, so far as you remember? A. The contract was for \$2,430.” He received from Carver, and produced, an account made out to himself before the lien proceedings were begun, shewing the amount of the contract made with him to be \$2,430.

Spence says in effect (p. 32): “Castell had nothing to do with my property, nor had I with his.”

“Q. Now, what was your contract? A. \$2,430” (p. 39).

“Q. In the completion of the houses, did you have anything to do with the adjoining house? A. None whatever.

“Q. And did Mr. Castell have anything to do with yours?
A. None.”

Castell had made out, and he produced at the hearing, a bill rendered to Carver, shewing the account between Carver and himself on the basis of a liability on his part for the cost of his own house—\$2,430.

Spence says (p. 36) that he handled no part whatever of the contract moneys in connection with the other—the Castell—property.

There is more evidence to the same effect, and none to any other. Clearly, then, there were two distinct acceptances of a tender which was severable, and which, with Carver's concurrence, was actually severed, so as to give rise to two distinct contracts.

Upon the Master's erroneous conclusion that there was but one contract, and that a joint contract between Spence and Castell on the one part and Carver on the other, for the erection of the two houses on the two parcels treated as one, is based his decision that Campaigne is entitled to a lien on the interest of the owners of both parcels for \$168.23, being the price of plumbing materials used in both the houses by the defendant Snodny, who had a sub-contract (and only one sub-contract) for the installation of the plumbing in both houses. The last of such materials—a bath and sink-basin—were furnished on the 6th August, and were placed in the Castell house by Snodny and his man, Marshall, on the 10th August. On the day when they were installed, Marshall did, he says, 15 minutes' work in the Spence house; but there is no evidence that any materials furnished for the Spence house were supplied within 30 days of the registration of the lien, which was effected on the 3rd September.

Holding, as I do, that there were two contracts, the lien, so far as it affects the interest of the Spences in their land, utterly fails.

The lien for \$168.23 also fails as to the Castell property. The Castell interest cannot be held liable for goods not supplied—as the materials installed in the Spence house—upon the request of the Castells, and not for their “direct benefit” (Mech-

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anics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 2 (c) (iv.)); and, as stated, the claim covers materials supplied for both houses. However, as the cost of the plumbing—work and materials—was the same for each house, and two sets of like fixtures are shewn by the accounts in evidence to have been supplied, it is, I think, a reasonable inference that half the materials was used in each. Half their cost is \$84.11, and the lien should be reduced to that sum and restricted to the Castell property. Materials to that amount were supplied at Mrs. Castell's request, carried on to Campaigne through Castell, Carver, and Snodny, and for the direct benefit of Mrs. Castell.

If Campaigne is not satisfied with the amount mentioned, he may have a reference at his own risk.

Success being only partial, and both appellants represented by the one solicitor and the one counsel, there should be no costs of the appeal. The plaintiff should, however, have his costs of the proceedings below as against Mrs. Castell, limited, however, apart from disbursements, to an amount not exceeding 25 per cent. of the amount recovered.

FALCONBRIDGE, C.J.K.B.:—I agree.

KELLY, J.:—The important element for consideration is, whether there was one undivided contract by Carver, the contractor, to build two houses for Spence and Castell, or in effect two separate contracts—one to build a house on the Spence lot for its owner, and the other to build another house for Castell on his lot. The two parcels adjoined. Carver signed a written tender, dated the 24th March, 1914, "for pair of houses on Wilson street for Messrs. Spence & Cassels" and to "do all labour and furnish all material to complete the house for the sum of \$2,467 each." This was supplemented by a written memorandum of the 11th April, 1914, that "the alterations you gave me note of will make a difference of \$37 for each house, which is \$74 for both, which will make \$2,430 for each house."

Carver employed Snodny to do the plumbing at \$165 for each house. The plaintiff supplied material to Snodny, for which he did not pay; and on the 3rd September, 1914, he caused to be

registered against both properties a claim for lien for \$168.23. In proceedings before His Honour Judge Monek to establish the lien, he held that the lien attached to the two properties. Carver and the property-owners have appealed.

The form of tender was such that acceptance could have been made by each of the owners separately for his own or her own house. The price for each was stated quite separate from and independently of the price for the other. There was no written acceptance of the tender by the owners jointly or by either of them separately; so that in that respect we are not assisted in determining whether the tender was treated by the parties as joint or separate. Something more than mere assumption is necessary on which to base a finding that there was joint acceptance—that there was but one contract for the two houses. But, if we look at the evidence of the manner the parties immediately concerned treated the transaction, a conclusion against one joint contract becomes apparent; for not only is there nothing to indicate the making of such a contract, but rather it becomes evident that the parties had in mind that the contractor was to proceed as on two separate contracts; and their subsequent dealings bear this out.

Carver says that each of the owners took care of his own contract, and that they paid separately for the houses. This is not contradicted. Carver's account rendered, the only one in evidence, is against Castell personally and in respect only of his house, and in it he makes a charge for "amount of contract \$2,430," clearly indicating that what he had in mind was a separate and distinct contract with Castell for his house, independently of the other, and for the price named in the tender for one house.

Spence says his contract was for \$2,430; that there was a tender for \$2,430 for his house and \$2,430 for Castell's. This also is not contradicted. He also says that in the completion of the houses he had nothing whatever to do with the other house, nor Castell with his; that he was not handling any part of the contract moneys in connection with the other property. I am compelled to the conclusion that there were two separate contracts.

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On the authorities, and in view of sec. 19 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, I am of opinion that the registration of the lien in the form it took was not improper. If there was anything objectionable in such registration, it only amounted to an informality, such as is provided against by that section. But, though the claim for lien may be free from objection in that respect, a difficulty may still be encountered in determining what part of the amount claimed is chargeable upon each separate parcel of land. Here the material-man's account is claimed against the properties as one, no distinction being made either in the claim or in the evidence between what was supplied for one house and what for the other.

So far as concerns the Spence property, the lien must fail. The evidence shews that that house was completed not later than the 1st August, more than 30 days prior to the registration of the claim for lien or the institution of proceedings to establish the lien. The only suggestion of anything to the contrary is in the evidence of Marshall, a workman of Snodny's, that on the 10th August he worked on these houses, and in a vague way says something of having worked on this house for 15 minutes; but, in the face of the direct evidence of its completion on the 1st August, Marshall's testimony is not sufficient, on which to found a claim against the Spence property, and the lien, in so far as it is against that property, should be vacated.

The Castell property stands in a different position. As to it the evidence of the registration of the claim within the time prescribed by the statute is sufficient. But the claim for its full amount against that property is not established. The contract for plumbing was the same for each house; the plumbing was the same; and, on the evidence submitted, it is not unreasonable to assume that one-half of the material claimed for went into each house, and that the price of what went into the Castell house is one-half of the amount so claimed.

As the case presents itself to me, it seems equitable that the lien should be held good against the Castell property for one-half of the \$168.23 claimed—or \$84.11. It is possible that, had the evidence been pursued further, it might have been shewn that

this is not the correct price of the material used in that house. If either of the parties is dissatisfied, he may have a reference, at his own risk as to costs, to determine the amount. The plaintiff is entitled to his costs, but only as against the Castell property and its owner, of the proceedings below, limited, however, as declared by sec. 42 of the Act.

Under the circumstances, there should be no costs of the appeal.

RIDDELL, J.:—Mrs. Castell owned a lot in Hamilton, and Mr. and Mrs. Spence owned an adjoining lot “jointly;” they were desirous of building two houses, semi-detached and similar in every way, one on each lot—“exactly the same” says the contractor.

They accepted a tender from Carver in the following form:—

“March 24th, 1914. Tender for pair of houses on Wilcox Street for Messrs. Spence & Cassels. I will build those houses according to plans & specifications furnished, with a few exceptions, namely, the plumbing the same as Roberts house & 2 x 6 joists in attic floor. The tinwork,” etc., etc. (here follow certain terms of no importance in the present inquiry). “I will do all labour & furnish all material to complete the house for the sum of \$2,467 each. There is no walks mentioned in the specifications.

“\$2,467 each house.

Myles Carver.

“All inside doors $1\frac{3}{8}$ except sliding doors.

137 John St.

South, City.”

Another document was afterwards written by Carver and accepted by Spence and Castell (acting for his wife):—

“April 11th, 1914.

“Tender for houses on Wilcox St. for Messrs. Spence & Cassels.

“The alterations you gave me note of will make a difference of \$37 for each house, which is \$74 for both, which will make \$2,430 for each house. . . .”

Carver made a contract with one Snodny for the plumbing. \$165 for each house—“they were exactly the same;” Snodny

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bought materials from the plaintiff, which went into the houses, but did not pay for them. The plaintiff filed his claim for a lien, and the case came on for trial before Judge Monck at Hamilton. The learned Judge took evidence and came to the conclusion stated in the following memorandum:—

“The defendant Carver made a single contract (exhibit 2 numbered and produced) with the defendants Spence and Castell to build, on two adjoining lots respectively owned by the last-named defendants, for erection, viz., two semi-detached houses. The plaintiff furnished to the said contractor materials required in the erection throughout. I think the lien attaches to both properties, and that the owner was bound to retain 20 per cent. of the contract price to answer the claims of lien-holders, including the plaintiff.”

The defendants Carver and the owners of the lots now appeal.

The judgment declares a lien for \$168.23 against both lots—being the whole amount of the plaintiff’s claim—and the first ground of appeal is, that, under the circumstances of this case, no lien can be declared against either lot.

The case of *Fairclough v. Smith*, 13 Man. R. 509, is relied upon in support of this proposition. In that case, one Smith had given a contract for two houses, one on his own lot and one on his wife’s; the workmen filed claims for liens upon the two lots for the whole work done on both houses; Killam, C.J., held that it was “impossible to find that the registered claims were sufficient to bind both lots held severally, and it seems equally impossible to give effect to them as against one of the lots only for the proper amount. To choose one or the other to be bound would be wholly arbitrary”—were it not for a circumstance hereafter to be mentioned, that case would be on all fours with the present.

The learned Chief Justice refers to three cases as supporting his conclusions, and these will now be examined:—

Currier v. Friedrick (1875), 22 Gr. 243, was a case under the Mechanics Lien Act of 1873: a mechanic, having erected two separate buildings under two distinct contracts with the owner of the land on which they were built, registered his claim for the whole amount due him against both lots. Proudfoot, V.-C.,

interpreting secs. 1 and 2 of the Act of 1873, 36 Vict. ch. 27, held that "separate statements of the several liens should have been made and the lands severally affected specified" (p. 245).

But that was in the evil days "before 1896," when "the legislation was in such a condition as that the Courts were often forced to allow gross injustice to be done by reason of technical slips. The remedy intended by the Act for the protection of workingmen and providers of materials was often burked by matters of form and not of substance. In that year (1896) the Legislature made a clean sweep of the old Acts, and recast the whole statute. . . . 'And no lien shall be invalidated by reason of failure to comply with any of the requisites of secs. 16 and 17 . . . unless, in the opinion of the Court . . . the owner . . . is prejudiced (*sic*) thereby . . . :'" *Barrington v. Martin* (1908), 16 O.L.R. 635 (Divisional Court), at pp. 638, 639. *Oldfield v. Barbour* (1888), 12 P.R. 554, is much to the same effect, and was also decided in the days of technicality.

The Massachusetts case *Rathbun v. Hayford* (1862), 87 Mass. 406, is to the effect that, if a fence is erected upon the land of several owners under one entire contract, a person who furnishes materials put into the fence cannot enforce a lien against the several lots of lands collectively: nor will an account (claim) filed on the whole amount due authorise the enforcement of a lien against either of them. This, it will be seen, is also on technical grounds. *Shaw v. Thompson* (1870), 105 Mass. 345, shews that, had the claims been in proper form, the plaintiff would have succeeded to such an extent against each lot as the jury were satisfied to allow and the evidence would justify—in this case the Court held: "If the jury were satisfied that a certain amount was due a petitioner for work done on either house, they would be justified in finding a verdict against such house for that amount, though they might not be satisfied that more was not due" (p. 351).

The Manitoba case was under the Act of 1898, 61 Vict. ch. 29 (Man.), which is substantially the same as our Act of 1896, 59 Vict. ch. 35 (O.), the provisions of which have (speaking generally) been continued in the subsequent legislation and revision; and, so far as authority is given, the authorities do not

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necessitate the decision, the new Act being in force. But the facts of the present case differentiate it in any case.

The claim of lien in the present case is against "the estate of Chester Spence . . . and Gertrude Alice Spence . . . and . . . the estate of Frances Amelia Castell . . . in the undermentioned land . . ." for the full amount; and both lots of land are mentioned. It sets out all that is required by sec. 17 of the present Act, R.S.O. 1914, ch. 140, and the only defects relied upon are two: (1) the two lots being named in one claim, and (2) the whole amount being claimed against both. As to the first, I see no more objection to two lots being named in one claim than in one deed—it is registered in the one case as in the other against both lots.

The second objection amounts to no more than this, that at the worst too much is claimed, which happens by no means infrequently in the case of a single lot. As we shall see, I do not think the objection is valid, even if a claim for double the true amount would be fatal.

I do not see that the claim is bad in any case, especially in view of sec. 19 of the Act: while the certificate of *lis pendens* follows the claim and is equally valid.

The technical objections (if there are any) out of the way, the main questions must now be answered: Can the lien be enforced against these lots (1) jointly or (2) severally, and, if so, (3) to what extent?

Whether the contract by the owners of the lots for the houses is joint for both houses, or several each for one house, is important, first, from this point of view, that is, as determining whether both houses were built at their request (R.S.O. 1914, ch. 140, sec. 2(c)). I agree with the learned County Court Judge that the contract was joint—e.g., the contractor could not have built one house and compelled the owner to pay him, leaving the other not even begun; in that view, both owners requested the building of both houses.

But that is not conclusive: a lien only attaches for materials "furnished . . . to be used in the making . . . of the

building . . . and upon the . . . building, etc., and the land occupied thereby . . . :” sec. 6.

Then we have two adjoining lots upon which are to be erected two semi-detached houses under one entire contract (this is the distinction in facts from the Manitoba case)—it seems to me that the whole structure is “the building” and not each a separate, “semi-detached” half; and that material furnished for the building, or either part of it, comes under sec. 6 of the Act—and both lots are “land occupied thereby.”

I am of opinion that the decision of the County Court Judge is right in this respect.

In this view, the time of delivery of any part of the materials will be the same for both lots, and that was sufficiently late to validate the claim.

There is no foundation for the contention which, reduced to its simplest terms, would mean that a person supplying materials can have a lien only to the extent of 20 (or 15) per cent. of his claim—or account—he is entitled to a lien for his whole account, or for so much thereof as (with due regard to the rights of others *in consimili casu*) can be paid by 20 (or 15) per cent. of the “contract price or actual value:” sec. 12 (1), (2).

I think the judgment appealed from is right, and the appeal should be dismissed with costs.

Had I come to the conclusion that the original contract was really double, i.e., a contract by each owner for his own half of the semi-detached structure, other considerations would have arisen.

I think the claim and certificate of *lis pendens* would have been valid, for reasons already given; but, in that event, it could not fairly be said that either requested the building of the other’s house: R.S.O. 1914, ch. 140, sec. 2 (c); and, therefore, neither would be liable to a lien on his land for materials furnished for the house of the other.

But we have sufficient to enable us to find that the work was done on both concurrently and to the same amount, and, therefore, half of the materials was furnished for each. Under the principle of *Shaw v. Thompson*, 105 Mass. 345, the Court might,

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and I think should, find that half was furnished for and went into each half of the building, and declare a lien accordingly. The conclusions as to time, quantum, etc., would be the same in this view as in the other. And the only practical result would be to change the wording of the judgment.

Appeal allowed in part; RIDDELL, J., dissenting.

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Trusts and Trustees—Conveyance of Interest in Land to Relative—Consideration—Promise of Grantee to Make Settlement for Benefit of Grantor—Present Trust—Resulting Trust—Interest of Grantor—Specific Performance—Equitable Relief upon Condition of Doing Equity—Will—Legacy—Disclaimer—Election.

The defendant conveyed all her undivided half interest in certain lands to her uncle, the testator, in consideration of his agreement to pay her, during her life, one-half of the rents of the property, less any disbursements, and after her death to convey one moiety of the property itself to her heirs. This was to be secured, in part at least, by a will which the testator was to make in her favour. He predeceased her, without settling the property, or devising it to her, but by his will he gave her a legacy of \$20,000. The defendant asserted a trust in her favour in respect of the property conveyed:—

Held, that by the conveyance all the interest of the defendant, legal or equitable, was intended to pass; and it was impossible to impute to the parties any intention of creating a trust *in presenti*.

Held, also, that there was no resulting trust, for there was a consideration—a consideration which from its nature could not entirely fail.

Seemle, that the conveyance was, having regard to the relationship of the parties, originally voidable in a court of equity.

Held, that one who covenants for value to settle land may be called a trustee for the objects in whose favour the settlement is to be made; but only on the assumption that the contract would in a court of equity be enforced specifically.

Fremoult v. Dedire (1718), 1 P. Wms. 429, and *Howard v. Miller*, [1915] A.C. 318, explained and applied.

Treating the contract as one capable of specific performance, and the defendant as seeking that equitable relief, she must herself be willing to do what was equitable: even if the original agreement had not been afterwards varied by mutual consent—as was contended—it could be specifically performed only if the defendant was willing to disclaim the legacy; and she was, therefore, put to her election; the other parties to the action being willing that she should take either a moiety of the property or the legacy, as she might prefer.

Judgments of MIDDLETON, J., and of a Divisional Court of the Appellate Division, reversed.

ACTIONS for a declaration that the defendant Mabel Carleton had no interest in certain lands in the city of Toronto, at the time of the execution by her of a mortgage thereon; that the mortgage was a cloud upon the title, which should be removed; and that the interest of the defendant Mabel Carleton had passed to Thomas A. Snider, now deceased. The two actions were consolidated.

January 26, 1914. The consolidated actions were tried by MIDDLETON, J., without a jury, at Toronto.

C. J. Holman, K.C., and *F. C. Snider*, for the plaintiff Snider.

W. J. Elliott, for the plaintiffs the Central Trust and Safe Deposit Company and Malsbary, and also for the residuary legatees under the will of Thomas A. Snider.

E. D. Armour, K.C., and *B. N. Davis*, for the defendants Carleton and Hillock.

February 6, 1914. MIDDLETON, J.:—The late Hannah Snider in her lifetime was the owner of the lands in question in this action, namely, a valuable piece of land situated on Bay street. She died on the 21st July, 1887, having first made her will, by which she devised her property to her husband, the late Martin Edward Snider.

Martin Edward Snider died on the 8th December, 1888, intestate, leaving him surviving as his sole heirs his children, Mabel Carr Snider, now Mrs. Carleton, and her brother Thomas. Mrs. Carleton was then about 12 years old and her brother about 16 years old. The brother and sister were taken to live with their uncle, T. A. Snider, in Cincinnati, and Mrs. Carleton lived with him until his death on the 17th June, 1912; the family consisting of Snider, his nephew and niece, and a niece of his deceased wife.

The brother did not turn out well, and, after having received advances from his uncle to the extent of about \$800, ultimately—on the 4th September, 1899—conveyed to him his half-interest in the Bay street property for a further advance of \$500. This transaction was never attacked during the lifetime of Thomas, and there was probably nothing in any way unfair about it, as the Bay street property was not then regarded by any of the parties as of any great value. Thomas E. Snider died some years ago; and upon the pleadings the sister, claiming to be his sole next of

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kin, attacked the conveyance; but at the trial this attack appeared to be hopeless and was abandoned.

At the time the uncle obtained the conveyance of the half-interest in this property, there was erected upon it an old and dilapidated building, and the outgoings for repairs and taxes consumed the entire income. Mr. Snider came to Toronto to see if matters could not be put upon a more satisfactory footing. He consulted Mr. H. E. Irwin, and as the result of the consultation a letter was written by Mr. Irwin to the niece on the 9th May, 1900. After outlining the situation, Mr. Irwin proceeded:—

“It had therefore become clear that the only way to realise the most out of the property was by the erection of a warehouse building suitable for the locality, and your uncle, with great generosity, has had erected a substantial building, at a cost of about \$10,000. It has been leased for a term of 10 years, at a rental which, after payment of insurance, will, I understand, yield about \$80 per month.

“You will further remember that your brother Thomas Edward Snider some time ago conveyed his interest in this property to your uncle, who, therefore, at the present time owns the building and a one-half interest in the land, while you are entitled to the other half-interest in the land.

“From a legal point of view this is a very unsatisfactory condition in which to have the property. If anything happened to your uncle, his estate might insist upon paying off your interest on the basis of the mere value of the land and premises as it stood before the erection of the new building, and this would be a comparatively insignificant amount.

“After carefully considering the matter with your uncle and Mr. Hillock, your uncle stated that it was his intention and desire that you should have the benefit of a one-half interest in the property, as it now stands, with the new building and all, as soon as the property could be put in satisfactory shape.

“I suggested, and it was agreed by all three of us, that the best way would be for you to make a conveyance at once of your interest in the land to your uncle. This will enable him to complete the lease and have everything with regard to the property finally settled. When this is done, the arrangement is that Mr. Hillock will continue to look after the property, and will, as the rents are

paid, transmit to you monthly one-half thereof, less any disbursements that have to be made from time to time. This will yield you an income of between \$39 and \$40 per month from this time forth as long as you live. This we have made secure to you by the execution of a will on the part of your uncle, who devises the property to trustees in trust to continue the payment of one-half of the rents to you for your life and at your decease to convey a one-half interest in the property absolutely to your heirs.

"The will is so drawn that nothing that can happen will, during your lifetime, interfere with the payment to you of one-half of the rents of the property. The will has been executed and left with Mr. Hillock.

"This means for you that the property, which has not been yielding \$40 a year, will yield hereafter \$40 per month to you, and it is certainly an exceedingly generous and kind arrangement on the part of your uncle, Mr. T. A. Snider.

"I have prepared a conveyance of your interest to your uncle, and have forwarded it to him at Cincinnati. The several matters here are waiting for the return of this, and as soon as it is received the whole matter will be closed up and settled, for, I trust, a great many years to come."

This letter and the deed were taken by Mr. T. A. Snider to Cincinnati, and his niece then executed them there. The conveyance was a quit-claim deed, in consideration of \$1.

The building then erected was destroyed by fire in 1904, and a new building was erected in 1905. Mr. T. A. Snider mortgaged the property to the Toronto General Trusts Corporation, to secure an advance of \$20,000, to permit the erection of this building. This mortgage is still outstanding against this property.

In pursuance of the arrangements embodied in the letter of the 9th May, 1900, Mr. T. A. Snider made his will, by which he gave the Bay street property in trust for the benefit of his niece and his nephew during the period of the natural life of the survivor, and upon the death of the survivor to the issue of the niece as to one-half, the issue of the nephew as to the other half, and, in default of issue of either, to his American executors.

This will was followed by a series of wills, each revoking the prior testament; and, speaking generally, until the last will each will cut down the provision for the niece. By the last will, dated

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the 6th June, 1912, the niece was given \$20,000 absolutely, and a Canadian executor is appointed, who is directed to realise upon the testator's Canadian estate and to transmit the proceeds to the American executor.

This will differs from some of the preceding wills, which specifically disposed of the Bay street property, and which made the legacy of the niece dependent upon her abandoning all claim to any interest in the Bay street property.

It is said that in 1909 a new arrangement was made, by which the niece abandoned all claim to a beneficial interest in the Bay street property. It will be remembered that the letter of 1900 refers to a conversation with Mr. Frank Hillock. Mr. Hillock is also an uncle of Mrs. Carleton, presumably on the mother's side. He took an active interest in her welfare, and, in addition, took charge of the Toronto property for Mr. T. A. Snider.

On the 10th May, 1909, Mr. Hillock had an interview with Mr. Snider at Toronto, resulting in another letter to the niece, as follows: "In conversation with uncle T. A. this afternoon he gave me to understand that he, on account of Ed. having died, he is going to make a new will. You will remember that he purchased Ed. half share in 78 Bay street, and got you to sign over your right to the other half so that he might put the money in a new warehouse, so as to get a return out of the property. The building when completed was leased for 10 years to Mr. Westwood, at \$244.25 per quarter, and, after paying the insurance, one-half, \$122.12 per quarter, less your share of the insurance, was paid to you. When the fire occurred, a new arrangement was made with Mr. Westwood, and you were paid \$600 per year. He is paying 6 per cent. for 10 years on the land, which was figured at 24 feet at \$700 per foot, \$16,800 at 6, \$1,008. Your half-share being 504. He is going to pay you as at present \$600 per year, and, in consideration of your giving up your claim to your half-interest in the land, he will insert in his new will to his executors to pay you at his decease \$1,200 per year during your life, and at your decease, to your children, \$20,000. Should you die without children, the \$20,000 will go back to his estate for other heirs. He is willing, as well as having it in his will, to sign an agreement to that effect. He says he will be back in Toronto about the middle of June."

To this the niece replied on the 20th May, 1909, as follows:—

“Your first letter forwarded to me from Chicago in regards to the lots. I am perfectly satisfied with anything you may do with them, as I know you know more about them than I do. I made no arrangement whatever concerning them when in Toronto. (This refers to some other property).

“Now the second one regarding uncle T. A.’s will is quite all right, but the present arrangements I do not think are quite right according to the original agreement.

“I have Mr. Irwin’s letter before me now, and, according to the original agreement, if I signed over my share I was to get one-half the proceeds, which, as you say in your last letter, I did receive one-half of \$244.25 per quarter. Now there was a new agreement with Mr. Westwood after the fire, but no different agreement with me, and, as uncle T. A. has not paid any more money up—the original agreement holds good that I receive one-half the proceeds, which is one-half the rents, minus insurance, interest on mortgage, etc., and, according to that, I do not think the present arrangement is quite right. I have lived up to my side of the agreement, and I feel uncle T. A. should live up to his, and I am still entitled to one-half the proceeds.

“You say uncle T. A. will continue to give me \$600 as at present—well, at present, and since the fire, I have only been getting \$560, so he cannot continue to give \$600 when it has only been \$560.

“Because the property has increased in value, I am most assuredly entitled to the benefit of that increase as well as uncle T. A. I only ask justice. I am alone in the world now, and have to look after my rights, and nobody knows how lonely I am and how I long for a home.

“Since the fire I have still been entitled to the one-half, and have not received it, so I wish you to put this before uncle T. A. I have consulted a lawyer, and he says I am right, as I have not signed any other agreement the original one holds.

“I am sorry to bother you, uncle Frank, for you have already done so much for me, but I have no one else to look to, and know you are just and see the justice in what I say.

“Poor Ed.—I am really happier to think he is gone, for I know now, and when he was living I never knew what to expect. Of

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course, it is hard to think that he had none of his own with him. If I had only seen him before he died.

"My love to all the folks. I am writing Bertha to-day."

This letter it is now sought to treat as an abandonment of the interest in the Bay street property, in consideration of the provisions suggested by the letter of Mr. Hillock.

I do not think this is the true meaning of the letter. It was not so understood by Mr. Hillock, according to his testimony at the trial, nor was any formal agreement or conveyance drawn up. Moreover, the will executed by Mr. T. A. Snider on the 2nd July, 1909, makes the legacy to the niece conditional upon her making no claim against his estate in respect of any property of her father, whether in respect of No. 78 Bay street or otherwise. In the event of any claim being made, she is to forfeit all interest, even though the claim is unsuccessful. This indicates that at that time Mr. Snider did not regard his niece's claim as extinguished.

Two issues were raised at the trial: first, as to the interest of Mrs. Carleton in the Bay street property; secondly, whether, upon the construction of the will, she is put to her election.

On the first issue, I think Mr. Irwin's letter of 1900 governs. Mrs. Carleton is entitled to a half-interest in the Bay street property, subject to one-half of the amount due upon the trust company's mortgage. The letter indicates an intention of the uncle to give her then a half-interest in the property as it then stood, and not to make any claim against her for reimbursement for the improvement the uncle had then made.

There is some question as to accounting, as Mrs. Carleton claims not to have received the entire half of the income. The accounts have been well and accurately kept by Mr. Hillock, and this matter can be adjusted before the judgment issues. If there is any difficulty, I may be spoken to about it.

The question of election must, I think, be determined from the will itself. I do not think that former wills can be looked at to aid in the interpretation, nor, if looked at, do I think they would in any way forward the contention of the executors and residuary legatees. The testator has deliberately omitted the express provision putting the niece to her election; and, instead of referring to the Bay street property specifically, he refers merely in general terms to such property as he owns in Ontario.

The will itself is not, I think, sufficient to put the niece to her election, as the only clause in any way relating to the Bay street property is item 7 of the will. By this Mr. Harvey G. Snider is appointed special executor "to settle any and all business matters that I may have on hand at the time of my death in the city of Toronto." To him is given "absolutely and in fee simple . . . any real estate lands and premises that I may own at the time of my death in the Province of Toronto (*sic*) Canada," in trust to sell and remit the proceeds to the general executor.

I have read, among others, the cases referred to by counsel, and I find the law so clearly and accurately stated in Halsbury's Laws of England, vol. 13, p. 121, para. 137, that it is not necessary to refer to the cases in detail: "To raise a case of election under a will upon the ground that the testator has attempted to dispose of property over which he had no disposing power, it must be clearly shewn that the testator intended to dispose of the particular property; and this intention must appear on the face of the will, either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption is that a testator intends to dispose only of his own property; and general words will not be construed so as to include other property, nor will parol evidence be admitted to shew that the testator believed such other property to be his own so as to allow it to be comprised in general words. Similarly, where a testator has a limited interest in property, and purports to dispose of the property itself, the presumption is that he intends to dispose only of his limited interest: and, if it is sought to carry the disposition further, it must be shewn that he intended to dispose of more than that interest."

Reliance is placed upon the fact that the testator speaks of giving property to his executor in fee simple, and authorises the execution of deeds to convey to the purchaser the absolute fee simple, and directs the payment of incumbrances out of the proceeds. All this I think quite insufficient to rebut the presumption that the testator is dealing with his own share in the property.

If one were at liberty to look outside of the will, there is nothing in the surrounding circumstances to indicate that the testator did not intend to make a somewhat liberal provision for his niece, who had become practically an adopted daughter.

In the result, the title of Mrs. Carleton to one-half interest in

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the property should be declared, and it should be declared that the will does not put her to her election. The accounts should be adjusted; and, if some arrangement cannot be made which is satisfactory to the parties, I may be spoken to as to the provisions which may be proper to secure payment to Mrs. Carleton of her legacy, as the proceeds of the testator's share of the Bay street property ought not to be transmitted to the foreign executor until the legacy is paid. It may also be thought desirable that a judgment in the nature of partition should now be pronounced, though I trust the parties may be able to agree upon some method of realisation without the assistance of the Court.

The costs of all parties in both actions may be paid out of the estate. These costs, however, must not include (so far as Mrs. Carleton is concerned) any costs solely occasioned by her unsuccessful attack upon the conveyance by the brother of his share.

The plaintiffs in the second action, the American executors of Thomas A. Snider, deceased, being also defendants in the first action, and Harvey G. Snider, the Canadian executor of Thomas A. Snider, the plaintiff in the first action and a defendant in the second action, appealed from the judgment of MIDDLETON, J.

April 20, 1914. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. J. Elliott, for the appellants the Central Trust and Safe Deposit Company.

F. C. Snider, for the appellant Harvey G. Snider.

E. D. Armour, K.C., and *B. N. Davis*, for the defendant Carlton, the respondent.

May 12, 1914. MEREDITH, C.J.O.:—The plaintiffs in the secondly-mentioned action, who are defendants in the first-mentioned action, and the American executors of Thomas A. Snider, deceased, and Harvey G. Snider, the plaintiff in the first-mentioned action, who is defendant in the secondly-mentioned action, and the Canadian executor of the testator, appeal from the judgment, dated the 6th February, 1914, pronounced by Middleton, J., after the trial of the actions before him, sitting without a jury, at Toronto, on the 26th January, 1914. The material facts are fully set out in the reasons for judgment of the learned trial Judge.

The conclusion of my learned brother was that the respondent was the owner of an undivided half-interest in the Bay street property, and that there was nothing to put her to her election to claim for or against the will in respect of that interest.

If, as my learned brother determined, the respondent was the owner of an undivided half-interest in the property, I agree with his conclusion that she is not put to her election.

All that the testator purports to dispose of by the 7th paragraph of his will is "any real estate lands and premises that I may own at the time of my death in the city of Toronto Canada."

There is nothing upon the face of the will to indicate that the testator intended to dispose of anything but his own property; and the settled rule now is that evidence *dehors* the instrument is not admissible for the purpose of shewing that a testator considered that to be his own which did not actually belong to him or was not under his disposing power: Jarman on Wills, 6th ed., pp. 541-2-3.

The question whether the respondent was the owner of an undivided half-interest in the Bay street property, or whether the testator was not the owner of the entirety, presents more difficulty.

The entirety had become vested in him by the conveyances from the respondent and her brother; the conveyance of the respondent's interest was made in pursuance of the arrangement evidenced by the letter of Mr. Irwin. That arrangement was that her interest was to be conveyed to the testator, upon the agreement by him that one-half the rents of the property should be paid to the respondent during her life, and this, as the letter states, "we have made secure to you by the execution of a will on the part of your uncle, who devises the property to trustees in trust to continue the payment of one-half of the rent to you for your life and at your decease to convey a one-half interest in the property absolutely to your heirs."

This letter and the will referred to bear date the 9th May, 1900, and the conveyance from the respondent to the testator bears date the 15th of the same month.

The statement of the letter as to the provisions of the will is not accurate. The devise to the trustee is to hold the land during the natural lives of the respondent and her brother and the natural life of the survivor of them, and upon the death of the survivor to

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convey to the issue of the respondent an undivided half-interest in it and to the issue of her brother a like interest, but if, at the death of the survivor, there should be no issue of either of them, to convey the undivided half or halves in respect of which there should have been a failure of issue to the executors or administrators of the testator's estate in the United States of America; and the provision as to the rents is that the trustee is to pay over to the respondent and her brother each one-half of the net proceeds of the rents and profits during their respective lives, "provided neither the said Mabel Carr Snider nor the said Thomas Edward Snider shall have alienated or otherwise disentitled herself or himself to personally receive her or his half-share of the said proceeds. If at any time it shall appear to my said trustee that either the said Mabel Carr Snider or Thomas Edward Snider has alienated or otherwise disentitled herself or himself to personally receive her or his half or the said proceeds or any part thereof, or that she or he has incurred debts or done anything whereby a judgment or order of any Court of competent jurisdiction shall have been made or obtained, or any writ of execution or attachment issued, then I direct that all right under this will of the one so alienated or becoming disentitled or against whom such judgment, order, or writ of attachment or execution shall have been issued, shall absolutely cease and determine, and any sums in respect of such rents and profits accrued but not yet paid to such beneficiary shall be forfeited, and I direct my trustees thereafter to pay over the share of the said proceeds so forfeited to the executors or administrators of my estate situate in the United States."

Mr. Irwin's letter also states that "the will is so drawn that nothing that can happen will, during your lifetime, interfere with the payment to you of one-half of the rents of the property." This also, in view of the provisions of the will which I have quoted, is an inaccurate statement of the effect of the will.

I have no doubt that, having regard to the relations between the respondent and the testator, who stood in *loco parentis* to her, the age of the respondent, the want of any advice, independent or otherwise, to the respondent, and the other circumstances, especially the fact that no security was given to her for the performance by the testator of his part of the arrangement, the transaction would have been set aside if the respondent had been minded to repudiate it.

The subsequent events, and especially the fact that, when the change in the arrangement was proposed to her through Mr. Hillock, the respondent consulted a solicitor and elected to abide by the bargain which had been previously made, would probably have disintituled her to set aside the conveyance to the testator, and apparently the position taken by her throughout the present litigation has been that she stands by the original arrangement and insists upon her rights under it; and that she is bound by it is the position taken by the appellants.

What, then, is the position of the respondent under that arrangement? The effect of it was, I think, to constitute the testator a trustee for the respondent of the undivided one-half interest in the Bay street property which she conveyed to him.

In *Fremoult v. Dedire* (1718), 1 P. Wms. 429, the testator had covenanted before marriage to settle lands in Rumney Marsh on his wife for life, and it was held by Lord Chancellor Parker that the marriage articles, being a specific lien on the lands, made the covenantor as to them but a trustee, and that they were, therefore, during the life of the wife, not affected by any of his bond debts.

Upon the authority of this case and other cases, it is said in Lewin on Trusts, 12th ed., pp. 160-1: "Again, if a person agree for valuable consideration to settle a specific estate, he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow."

It is, I think, immaterial for the purposes of the present inquiry whether the trust is for the respondent for her life and after her death for her heirs, or by force of the rule in Shelley's case a trust for the respondent of the fee simple in the lands, though I think that it is the latter. The promise is to devise the land to trustees in trust to pay the one-half of the rent to the respondent for her life, and at her decease to convey a one-half interest in the property to her heirs, so that both estates are equitable, and the rule applies.

See *Van Grutten v. Foxwell*, [1897] A.C. 658, in which the limitations were not unlike those which, according to the agreement in this case, were to apply to the undivided half-interest in the Bay street property.

Upon the whole, I am of opinion that the judgment of my

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brother Middleton is right and should be affirmed, and that the appeals should be dismissed with costs.

MAGEE, J.A.:—Under the circumstances under which the deed was made by Mabel Snider, now Mrs. Carleton, to her uncle, of her undivided half-interest in the Toronto property, I have no doubt that she could have had it set aside. But for some years before his death she chose to act upon the terms of Mr. Irwin's letter, upon the faith of which it was executed, and she now stands upon that letter—under which her uncle was not the absolute owner of the property, but held it for a definite purpose, which must be taken to have been well known to himself. I agree with my Lord the Chief Justice that the devise in the will should not be read as applying to that half of the property; and, therefore, that she is not put to elect between her interest and the bequest. I express no opinion as to whether she would in any case be entitled to more than a life interest, which alone she would have to sacrifice to obtain the legacy.

MACLAREN and HODGINS, J.J.A., agreed that the appeal should be dismissed.

Appeal dismissed.

The executors appealed to His Majesty in His Privy Council, and the appeal was heard by a Board composed of VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

P. O. Lawrence, K.C., and *W. J. Elliott*, for the appellants.

E. D. Armour, K.C., for the respondent Mabel Carlton.

The other respondents were not represented.

December 21, 1915. The judgment of the Board was delivered by LORD PARKER OF WADDINGTON:—The questions for decision in this case concern the title to certain hereditaments in Toronto, known as 78, Bay street, and arise under the following circumstances:—

The late Martin Edward Snider died in the year 1888, intestate. He was at the time of his death the owner of the property in question, which then consisted of about 23 feet of frontage on the west side of Bay street, with a small half-brick residence erected thereon.

He left two children, Thomas E. Snider and the defendant Mabel Carleton, and the property devolved upon them as his co-heirs. After their father's death, they went to live with their uncle, Thomas A. Snider, hereinafter referred to as the testator.

On the 4th September, 1899, the testator purchased and took a conveyance of the moiety of the property belonging to Thomas E. Snider. The validity of this transaction is not now in dispute. The testator, having thus become entitled to a moiety of the property, proceeded to erect thereon a warehouse, at a cost of some \$10,000.

On the 15th May, 1900, the defendant Mabel Carleton, by deed, conveyed to the testator all her estate and interest, legal or equitable, in the property in question, to hold the same unto and to the use of the testator in fee simple. The consideration expressed in the deed was the nominal consideration of \$1, of which she acknowledged the receipt. The real consideration was admittedly that expressed in a letter dated the 9th May, 1900, and written to her by Mr. Irwin, the testator's legal adviser. According to this letter, she was to be paid during her life one-half of the rents of the property, less any disbursements, and after her death one moiety of the property itself was to be conveyed to her heirs. This was to be secured partly by the management of the property being left as theretofore in the hands of her maternal uncle, Frank Hillock, and partly by a will which the testator was to make in her favour.

It is, in their Lordships' opinion, probable that the last-mentioned transaction was, having regard to the relationship existing between the parties, originally voidable in a court of equity. Whether, having regard to what subsequently happened, is still remains voidable, is a different matter, and one which need not be considered, for no claim has been made to avoid it. On the contrary, the defendant Mabel Carleton claims on the footing that by virtue of the conveyance of the 15th May, 1900, and in the events which have happened, the testator at his death held the property conveyed in trust for her. Her counterclaim asks for a declaration that this conveyance, though absolute in form, was intended only as a conveyance in trust for her; and the first reason in her case on the present appeal is that, the conveyance having been made in consideration of a promise which was never

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carried out, there is a resulting trust in her favour. Neither the suggestion of an intention to create a trust, nor the suggestion of there being a resulting trust, is consistent with a claim to have the conveyance set aside on equitable grounds. It is worth while, however, before proceeding further with the history of the case, to consider both these suggestions.

In their Lordships' opinion, the intention of the parties must be gathered from the conveyance and Mr. Irwin's letter. The intention, as manifested by the conveyance, is clear enough. All the interest of the defendant Mabel Carleton, whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with, and a good deal to confirm, this. The testator was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not be properly done if the defendant Mabel Carleton remained equitable owner of a moiety of the property. Further, the testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise. A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed; and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust. With great deference, their Lordships think that the trial Judge, in holding that the letter created a trust, did not give sufficient weight to these considerations. In their opinion, it is impossible to impute to the parties any intention of creating a trust *in presenti*.

The suggestion that there was a resulting trust does not appear to have been dealt with in the Courts below. It is, in their Lordships' opinion, equally untenable. When once the conclusion is arrived at that a grantor intends to part with his whole legal and beneficial interest in favour of another, there can be no resulting trust, unless, in the view of a court of equity, there be no consideration to support the transaction, or the consideration, if any, entirely fails. It is not alleged that there was no such consideration in the present case. It is suggested that the consideration failed. But how can there be a total failure of a consideration consisting, in part at any rate, of a promise to do some-

thing in future? If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration. The consideration is the covenant, and failure to observe the covenant results in a right of action at law on the covenant or for its breach, and not in any equitable right based on failure of consideration.

In their Lordships' opinion, Meredith, C.J.O., put the matter on a surer ground. There being no question of setting the transaction aside, the only point to be determined is whether, by virtue of the testator's promise to settle the property given in the letter of the 9th May, 1900, for valuable consideration, the defendant Mabel Carleton became entitled in equity to any and what interest. The learned Chief Justice refers to the case of *Fremoult v. Dedire*, 1 P.Wms. 429, as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in Lewin on Trusts, 12th ed., pp. 160-1, where it is stated that if a person agrees for valuable consideration to settle a specific estate, he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow. *Fremoult v. Dedire* was undoubtedly a sound decision, and there is little fault to find in the statement in Lewin on Trusts as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a court of equity to grant, and its practice in granting, specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a court of equity be enforced specifically.

If, for some reason, equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard v. Miller*, [1915] A.C. 318, in connection with the

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law as to the registration of titles in the Province of British Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a court of equity in specifically performing the contract, and could only be defined by reference to the relief which the court would give by way of specific performance.

If, therefore, the defendant Mabel Carleton has any interest in the property, it can only be because an action would lie for specific performance of the testator's contract to settle the property in her favour. Their Lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge v. Synge*, [1894] 1 Q.B. 466—and that the defendant Mabel Carleton is in the present action seeking to have it specifically performed. On this footing two questions arise: First, was the contract varied by substituting for the promise to settle the property a promise to leave the defendant Mabel Carlton the legacy of \$20,000 which the testator in fact gave her by his will? Secondly, if there was no such contract to vary, can the defendant Mabel Carleton enforce specific performance without abandoning her interest in this legacy? In considering these questions, it is necessary to deal in some detail with what happened after the original promise was made.

It appears that the testator, shortly after the conveyance of the 15th May, 1900, granted a 10-year lease of the property, at an annual rent of \$977; and one-half of the rent, less outgoing, was duly paid to the defendant Mabel Carleton. In the year 1904, the warehouse built by the testator was burned down, and the testator thereafter erected on the property a larger warehouse, at a cost of \$27,000. This sum was provided partly out of moneys received for insurance, partly by a mortgage of the property for \$20,000, and partly out of the testator's private moneys. On the 26th June, 1905, the testator granted a lease of the property for 10 years, at an annual rent of \$2,632.72. In the year 1909, the testator, through Frank Hillock, proposed to the defendant Mabel Carleton to modify the arrangement contained in the letter of the 9th May, 1900, as follows, that is to say, the defendant

Mabel Carleton was to be paid \$600 a year during his life, and he was by his will to give her an annuity of \$1,200, with a legacy of \$20,000 to her children after her death, she on her part giving up all interest in the property in question. The answer of the defendant Mabel Carleton to these proposals is contained in her letter to Mr. Frank Hillock of the 20th May, 1909. She refers to the arrangement as to receiving half the rents of the property, and complains that she has not even had the \$600 now proposed to be paid to her. She insists on this arrangement being adhered to. She says, however, "As to uncle T. A.'s will, that is all right;" and, in their Lordships' opinion, this can only mean that she is willing to accept the new proposals so far as they relate to the provisions of the \$1,200 annuity and the legacy of \$20,000 to her children after her death, instead of the interest in the property itself, which was to be secured to her according to the original arrangement by her uncle's will. The letter, therefore, is at most a proposal, and not the acceptance of an offer so as to constitute a contract modifying the original arrangement.

There the correspondence ends, but it appears that the testator thereafter paid her \$600 a year, which amounted approximately to one-half the rents of the property, and also made a will bequeathing to her an annuity of \$1,200 and to her children after her death the sum of \$20,000. The defendant Mabel Carleton discussed these provisions with him, evidently on the footing that they were to be in substitution for her interest in the property after his death. She suggested that there was no reason why the legacy should not be left to her absolutely instead of to her children. There was no reason why anybody but herself should benefit by her father's property. By his last will the testator left her an immediate legacy of \$20,000, but did not leave the property itself, as provided by the letter of the 9th May, 1900. Under these circumstances, their Lordships conclude that the \$20,000 was left to her on the footing that she had relinquished or would relinquish her interest in the property itself, and that she knew it was so left, and did nothing to bring home to the testator the fact that she would not accept it on this footing. It would be clearly inequitable to allow a legatee, while insisting on her legal right to the legacy, to appeal to a court of equity to complete her title to the property itself.

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A person who asks equitable relief must himself be willing to do what is equitable. It follows that, even if the agreement of the 9th May, 1900, has not been varied by mutual consent, it can only be specifically performed if the defendant Mabel Carleton is willing to disclaim the legacy. The appellants being willing that the defendant Mabel Carleton should take either a moiety of the property itself, subject to the existing mortgage, or the legacy, whichever she may prefer, it is unnecessary to decide whether there was ever any binding agreement for the variation of the original contract.

Under the circumstances, their Lordships are of opinion that the appeal succeeds, and that the right order will be to declare that the defendant Mabel Carleton cannot take both the interest in the property, to which the Courts below have declared her to be entitled, and the \$20,000 legacy, and to limit a period of three months within which she is to exercise her election.

Their Lordships will humbly advise His Majesty to this effect, and they think that the respondent Mabel Carleton should pay the appellants' costs here and in the Court of Appeal. With regard to the costs here and in the Court of Appeal of the other respondents, they should be paid out of the estate of Thomas A. Snider.

Appeal allowed.

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LLOYD V. ROBERTSON.

Will—Action to Set aside after Probate Granted—Judicature Act, R.S.O. 1897, ch. 51, sec. 38; R.S.O. 1914, ch. 56, sec. 3—Want of Testamentary Capacity—Undue Influence—Onus of Proof—Suspicious Circumstances Surrounding Execution of Will—Shifting of Onus—Finding of Fact of Trial Judge—Authority of Decided Cases—Reasonableness of Disposition made by Testator—Parties—Rights of Beneficiaries not before Court—Costs.

The grant by a Surrogate Court of letters probate of a will does not stand in the way of a determination by the Supreme Court of Ontario of the questions involved in an action in which the will is attacked on the grounds of want of testamentary capacity and undue influence: *Judicature Act, R.S.O. 1897, ch. 51, sec. 38; R.S.O. 1914, ch. 56, sec. 3.*

One of the two sons of L., deceased, brought this action against the executors to set aside, because of undue influence and want of testamentary capacity, a will of which probate had been granted; the other son, the principal beneficiary under the will, was added as a defendant at the trial: —

Held, that the plaintiff, attacking the will, admitted *primâ facie* its existence, and so did away with further formal proof of its execution and all that flowed from that proof; but, when suspicious circumstances attending the execution were shewn, the onus was shifted, and it lay upon him who obtained the execution of the will to satisfy the conscience of the Court that the paper writing in question contained and expressed the last will of the deceased.

And *held*, that the defendants had not satisfied that onus.

No two cases of wills are exactly alike; each must be determined upon its own facts; and a finding of fact in one case is not binding in any other case in which it does not operate as an estoppel.

The disposition which a testator makes in his will may afford evidence for or against the validity of the will; but no person is required to make a will such as others may think reasonable or proper; and the onus upon those supporting the will does not include shewing that the disposition made is a reasonable and proper one.

Adams v. McBeath (1897), 27 S.C.R. 13, considered and distinguished.

And *held*, that it should be adjudged that the will in question, in so far as it conferred any benefit upon any party to the action, was not the will of the deceased; but this did not affect the rights of beneficiaries under the will who were not parties.

Held, also, that executors supporting a will, and failing, should ordinarily pay costs personally and look to those who have indemnified them for reimbursement, if indemnified as they should be; but, whether indemnified or not, should not have costs out of the estate ordinarily. In the circumstances of this case, however, it was ordered that the added defendant should pay to the plaintiff the costs of the day at the trial, fixed at \$100, and no other order as to costs was made.

ACTION for a declaration that a certain testamentary writing signed by John Lloyd, deceased, and admitted to probate by the proper Surrogate Court, was not the true last will and testament of the deceased, and to set aside the grant of letters probate.

December 1, 1915. The action was tried by MEREDITH, C.J. C.P., without a jury, at Stratford.

J. C. Makins, K.C., for the plaintiff.

J. J. Coughlin, for the defendants.

January 3, 1916. MEREDITH, C.J.C.P.:—There is but one question involved in this action, and that question is entirely one of fact:—Is the will in question the last will of John Lloyd, deceased?

The plaintiff attacks it on the grounds of want of testamentary capacity and undue influence; the defendants pleading that the testator “was of sound mind and testamentary capacity;” that the will was “not obtained by any undue influence;” and that “it is the true last will and testament” of the said “John Lloyd.”

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Probate of the will was granted to the executors named in it, by the proper Surrogate Court; the proceedings there having been taken in common form, without notice to the plaintiff, who is one of the two sons of the said John Lloyd, they two being his only heirs at law and next of kin him surviving.

The proceedings in the Surrogate Court do not stand in the way of a determination here of the questions involved in this action; it is now so expressly provided by legislation; see the Judicature Act, R.S.O. 1914, ch. 56, sec. 3; and the Judicature Act, R.S.O. 1897, ch. 51, sec. 38.*

There is no conflict of testimony as to the circumstances under which the will was made. In regard to all things about which there might be expected to be disagreement, the whole of the testimony comes from those who support the will, and who have some personal interest in supporting it, one very much, another little, and the third the solicitor for him who has much interest in supporting it.

John Lloyd was 74 years of age when the will was made. He had never made a will before, nor ever before expressed any desire or intention to make a will, as far as the evidence shews; but he had, if the plaintiff's testimony be true, expressed the opposite intention, and his satisfaction with the will that, if he made none, the law made for him, giving to each of his sons an equal share of his property.

John Lloyd died on the 23rd day of May, 1915; his wife had died on the 22nd day of March, 1902, and he had not married again. She had left a will, of which she appointed him, and their two sons, executors. Under this will the plaintiff got much less than his brother of their mother's property.

*3. The Supreme Court shall be continued as a superior court of record, having civil and criminal jurisdiction, and it shall have all the jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a Divisional Court of that Court, and such jurisdiction, power and authority shall be exercised in the name of the Supreme Court.

38. The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

John Lloyd had long owned a house and lot in Stratford, and there, for many years before giving it to his son Albert, had carried on business as a vendor of groceries and such other things as are usually sold in what are commonly called "corner stores," far enough removed from the central business part of the city or town to create a local trade of more or less extent.

The plaintiff, when an infant, had been adopted by an uncle; and, although they quarrelled and separated, the plaintiff had never lived at home with his father and mother but for short periods. Albert, the other son, with few and short exceptions, had always so lived at home, and had worked for his father, in carrying on the business of the store, until he married and moved to a house of his own, yet however so remaining in his father's service until the business was made over to him, in the year 1910. Albert, from the time he was grown up until that time, was paid wages for his services by his father; not large wages, but enough apparently to enable him to keep himself and his family comfortably, and to acquire some property.

In the year 1910, Albert acquired from his father all the property that his father had except money amounting to about \$7,000; the son giving to the father the right to occupy a room at the back of the store; and the son also agreeing to maintain his father "in a manner equivalent to that in which he had lived in the past," and to pay to him \$50 a year, during his life.

For some years before his death, the father had lived quite alone in "the room at the back of the store;" the son having a house of his own, not far away. The son's wife sent over a "hot dinner" every day to the father in his room at the back of the store, any other food that he ate he got, and, if cooked, cooked for himself, and his room was attended to by a charwoman once a week at the cost of the son, the charwoman doing the work in the half day she worked for the son cleaning the store. In these uninviting conditions—"morbidity" one of the learned counsel described them—this old man lived, entirely alone in the building at night, until he was taken to the city hospital suffering from mortification in one foot, and pronounced diabetes. The foot was soon after amputated, and about six weeks afterwards the man died in the hospital, from, it is said, diabetic collapse.

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It is quite plain to me, upon the whole evidence, including the demeanour of the son Albert in giving his testimony, that he, Albert, had long been entirely convinced that he had, and has, a natural right to all of his father's property, because of having been always with or near his father and serving him for so many years in the business, as I have mentioned; and that his brother was not really entitled to any of it.

An early manifestation of this kind of selfishness took place at their mother's death; she had made a will giving to him the largest share of her property, as he well knew. The plaintiff was with his mother before she died, and has testified that on her death-bed she was troubled about something that had been done, and that she expressed, in a not unnatural and rather pitiful manner, a strong desire to make some change so that each of her sons might share equally her bounty, for, as she said—if his story be true—each was alike her son. The plaintiff, according to his story, went at once to his brother and told him of their mother's wish, and asked if any will had been made. The brother's answer was a denial of any knowledge of a will: a denial expressed thus: "You know as much about it as I do," or words to the like effect; and, although the brother Albert denies part of this story, he does not deny saying that which was untrue regarding any knowledge of a will. So that there is, in his own testimony, that which amounts to an admission that he falsely denied knowledge of the existence of this will, in order that he and his family might have the lion's share of the mother's estate. And it is plain that he is a man who is not scrupulous, when he can gain by being otherwise, though doubtless in the belief that he ought to have it anyway. And it may be added that in one of the plaintiff's letters to his father, written soon after the mother's death and put in as evidence against him, he refers to his mother's dying wishes, which he says he thinks his father and brother should have listened to, even though not in black and white. I am inclined to believe the plaintiff's story wholly.

In the year 1910, Albert procured from his father a conveyance to himself of all the father's property, except ready money amounting to some \$7,000, as I have already mentioned. The son

really retained, and actually paid, the solicitor through whom the legal part of this transaction was effected. The father had no independent advice; and the transaction, self-evidently, would have been a very improvident one if the father had not other means—that is, the \$7,000—beyond that which he had had in the property given to the son: whether, under all the circumstances, it was so improvident that it might be set aside, I have not to consider now.

This was the second step in the acquiring by this son of his parents' property, in the comforting belief that he ought to have it because he had stayed at home.

Having regard to the father's age and loneliness, and to his not only natural confidence, but practically necessary trust, in his son, this transaction ought not to have been carried out without competent independent advice first had by the father.

After the mortification had set in and become serious, and long after the diabetic condition had become also a serious ailment, and not long before the man was taken to the hospital, and about a month before his leg was amputated, at the age of 74, the will in question was made.

There is no evidence that he had ever before made a will, or even thought of doing so; the only testimony on the subject is that of the plaintiff, to which I have already referred: testimony which, to say the least of it, accords with his father's conduct, and rather unusual conduct, in not having made any will in all his life up to that time.

Albert admits that the will was made at his suggestion. He said that, in answer to his suggestion about making a will, his father said, "he might as well he guessed." Albert employed the solicitor who drew the will; that solicitor being the solicitor who also drew the transfers of the property in 1910. He said that his father assented to his suggestion that he should—or rather, his request whether he should—telephone for this solicitor. The son also admits having discussed, with his father, the will, and that he knew what it was to be, before the solicitor came to get his instructions.

The instructions were given by the father to the solicitor, but in the son's presence. The son was in the store when the

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solicitor came, and went with him to the father's room; the father being confined to his room by the condition of his foot. The son went out to the store again, but came in again whilst the solicitor was taking his instructions. The solicitor then asked if the father wanted the son in; and the father said emphatically that he did—so the solicitor testified—and the son did remain; taking no part, it is said, in giving instructions, except in supplying his wife's christian name, which the father could not remember.

This, it need hardly be said, was all unwise. If Albert were not pulling the strings, if the instructions would have been the same in his absence, and after reasonable precautions taken to learn the truth as to this, then in his own interests it was unwise; otherwise, in the interest of justice, it was unwise. And, if honest, there was no kind of need for any such methods.

There was a circumstance of some consequence in connection with the taking of these instructions which ought not to be passed over in silence. The solicitor testified that on this occasion John Lloyd asked him if he thought it was wise to make a will. The solicitor's present interpretation of the question is that it had reference to a Judge's understanding the meaning of the will—broadly put, was it worth while making a will when the Judges were not likely to understand it?—and that it was not asked in any fear that the Court might set it aside. But, if that were the man's thought, his mind could not have been able to form a reasonable view of even so simple a matter as that; his will was so simple and plain that even a Judge could hardly stumble over its meaning. If I had to find the man's object, I should have little difficulty in concluding that the question corroborated that which the plaintiff testified to as having been said to him by his father on the same subject; so that what was in the man's mind, more or less beclouded, was whether it would not be better to let the will which the law makes stand; equal division among his children of all that was left.

The instructions for the will plainly and admittedly affected only the ready money the man owned, which was all that he or his son Albert or the solicitor thought he owned. Yet the residuary clause disposes expressly of all lands and goods; a thing

absolutely unjustified in any shape or form. To contend that, without instructions or authority, the draftsman of a will should, or might, include a general residuary clause, is to contend for something obviously wrong, indeed obviously inexcusable. To do so, and call attention to it, in cases in which it may be necessary, or advisable, is quite another thing. If the man had no other property, then there was no need of it; if he had, it was not his will but the will of the draftsman, to that extent. Under no circumstances can this residuary clause, in so far as it might affect any property except the \$7,000, stand. That it might affect other property is obvious. It is not an unknown thing to own, unknown at the moment, property; and in this case it would actually, if the will were valid, carry the property deeded to Albert in 1910, if that deed were invalid by reason of improvidence of the transaction or otherwise. And there is more than that in this fact; it goes to shew that the reading over of the will did not convey to the man's mind its character and effect; that he did not, to this extent at all events, know and approve of its contents.

The will was prepared at the solicitor's office, and, the next day after the instructions were given, it was signed by the testator in the presence of the two witnesses to it—the solicitor and one of the executors. Albert was also there, as usual, in the store; and went in with the witnesses, and attended to his father's foot, so that the executor, who is the partner and father of the physician and surgeon of John Lloyd, might have a professional look at it. After that was done, he went back to the store, the door was closed, and the will executed.

Notwithstanding the man's age and infirmities, including partial deafness, and all the circumstances leading up to the making of the will, and although the one witness directly connected with the transaction was a partner and the father of the man's medical and surgical adviser, and was to be an executor of the will, not one step was taken, or one question asked, with a view to testing the man's capacity or whether he really knew and approved of the contents of the will. The solicitor's testimony is that he read the will over and asked Lloyd if it was as he wanted it, and Lloyd said that it was. That is all.

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It is to be regretted that that was all. I cannot think that that should be all in such a case. Witnesses should be real witnesses; witnesses to a will, and especially in such a case as this—the man being very old and very sick and alone in the world, except for the presence of his son, by whom the transaction was set in motion, and the witnesses being one who knew all about the contents of the will and the other him who was to carry it into effect—ought to be much more than automatons—or, as vulgarly said, “rubber stamps.”

Another circumstance, indicative of Albert's self-righteous selfishness and care for the main chance, occurred just before his father's leg was amputated. Until then he had said nothing to his brother about their father's illness; and then telegraphed only when it was too late for the plaintiff to reach Stratford and see his father before the operation, though he lived in Hamilton; and refused the plaintiff's earnest entreaty to endeavour to have the operation put off until the plaintiff could see his father; and all this though at the man's time of life such an operation—amputation of a gangrenous leg—was likely to prove fatal.

The son Albert testified that up to the time of the making of the will there was nothing irrational in his father to his knowledge; that his father's will was stronger than his; and that he was always a strong, healthy man.

In truth he was a very old and lonely man, suffering from two fatal ailments. I prefer very much the testimony of the father himself, upon that point, to that of this son. On the 7th April, 1902, in his own hand he wrote these words: “Please remember that I have went through a lonely time never to be forgotten, not being well, having a smothering sensation part of the time. I have started to take the South American nerve tonic, Saturday evening first dose after supper. Aunt Maria is keeping house for me yet and are running the store yet same as usual, but do not know how long, do not know what is best to do, mind is not strong enough to do anything different as yet, and not strong enough bodily for to do any work, have a good appetite, that is one thing that favours me.”

These words form part of a letter written by him to his son

the plaintiff, just thirteen years before the death of the writer of them.

Dr. English, of much experience in lunacy matters, expressed the opinion that the man was not of sound and capable mind at the time when the will was made.

The young man who was assistant to Albert in the store at the time the will was made, called by the defendants to prove the man's mental capabilities, spoke of him as being a little childish.

A number of witnesses, mainly neighbours, who saw him occasionally, and some of whom made small purchases from him in the store, testified to his capability; though it is obvious that they had no opportunity for testing his mental capacity in "passing the time of day" with him, or making small purchases of tobacco or such things, even though some of them were in the habit of calling him "Daddy," a nick-name not commonly applied to a man vigorous in body and mind.

In these circumstances, as a juror, or judge of fact, I decline to accept the paper writing in question as and for the last will of John Lloyd, deceased, unless the son Albert has proved—that is, upon the whole evidence in the case, has satisfied the onus of proof—that the transaction by which he obtained the will was "a righteous one," as the cases put it, or, as I would put it, that the will is really the will of John Lloyd, deceased.

That the circumstances attending the making of the will shift the onus of proof from the plaintiff to the defendants is very plain. It can make no difference in this respect that this is an action to set aside a will of which probate has been granted in the Surrogate Court, as I have before mentioned. It would be an intolerable state of the law if it depended upon the Court in which the action was pending where the onus of proof rested. The plaintiff, attacking the will as he does, admits *primâ facie* its existence, and so does away with further formal proof of its execution and all that flows from that proof; but the onus shifts again under the suspicious circumstances attending the execution of it; and now, in this Court, in an action such as this, just as it would be in the Surrogate Court or in this Court in an action to establish the will, he who obtained the will under those

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circumstances must satisfy the conscience of the Court that the paper writing in question contains and expresses really John Lloyd's last will: and throughout the trial this case has been so treated on both sides: though the better way of raising these questions might have been in the long-established probate practice of calling for proof of the will in solemn form.

If John Lloyd were incapable of making a will, or, if capable, the will was obtained by undue influence, or if the man did not know and approve of the contents of the will, it is not really his last will, and should be set aside.

The defendants have not satisfied the onus of proof in any one of these respects; and they have very far from satisfied my conscience or judgment that the paper writing in question contains and is the last will of John Lloyd, deceased.

It is not needful to go further; but, if it were, I should have no great difficulty in finding that, though the voice that gave instructions, as to the will, was the voice of John Lloyd, the hands that pulled the strings controlling that voice were the hands of his son Albert.

But it is contended that because Samuel Adams' will was upheld in the Supreme Court of Canada in the case of *Adams v. McBeath* (1897), 27 S.C.R. 13, I am bound to uphold John Lloyd's will in this case; overlooking the facts that, however, it may be as to two blades of grass, no two cases of wills, such as these, ever can be quite alike; that each must be determined upon its own facts; and that not only is a finding of fact in one case not binding in any other case in which it does not operate as an estoppel, but that no Judge or juror has a right to shirk his duty, to find the facts in the case he has to try, because some other Judge or juror had made a finding in another case under which he might like to shelter himself. It is labour, and unpleasant labour, to find all the material facts in this case upon the evidence adduced; but that I have to do, and that the Judges concerned in the *Adams* case had not to do.

It is all very well for Judges to lay down rules for their own guidance in dealing with questions of fact; rules generally indicating only the course which every rational man would pursue in seeking the truth of the matter, and to that extent harmless,

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if also helpless; that is, helpless as the information is that the sun shines by day and the moon by night—subject, so far as some mortals are concerned, to exceptions: it is all very well, but, after all, the real question in such a case as this is: has the will in question been proved to be really the will of the person appearing in it to be the testator?

Every one of ordinary common sense will subscribe to the grounds upon which the *Adams* will case was decided: that, in order to set aside a will on the ground of undue influence, it is not sufficient to shew circumstances consistent with the exercise of undue influence, provided they are also consistent with due influence. So, too, it might be said, with equal solemnity, that where the evidence is no more than consistent with a due execution of the will and equally consistent with undue execution, due execution is not well proved.

But that decides nothing conclusive until it is determined upon whom the onus of proof lies. In that case a majority of the Court acted as if it rested on the appellant, who opposed the will. In this case I hold that unquestionably it rests on the defendants, who support the will; and, giving full effect to Lord Cranworth's dictum, which the majority of the Supreme Court of Canada in the *Adams* will case adopted and attempted to act upon, my finding must be against the defendants.

Sedgewick, J., in expressing his views in the *Adams* will case, said (p. 21): "Stress was laid upon the fact that McBeath, the beneficiary, was the person who gave instructions to the solicitor who drew up the will, and it was contended that in consequence the full burden was placed upon the beneficiary to prove that that transaction was a proper one. I am not disposed to question that proposition. It has, in my view, however, been shewn that the disposition that the testator made of his property was a reasonable and proper one, a disposition which might have been made, and which I believe was made, without any improper influences operating in favour of the beneficiary."

So that in that case the course which I take in this case was admitted to be the proper one; it could not be thought otherwise by any one at all familiar with the law as expressed and acted upon in such cases as *Fulton v. Andrew* (1875), L.R. 7 H.L.

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448, *Tyrrell v. Painton*, [1894] P. 151, and *Wilson v. Bassil*, [1903] P. 239.

But the learned Judge, from whose opinion I have quoted, seems to have thought that the onus of proof is a much wider and different one from that which I hold it to be; that it includes shewing that the "disposition which the testator has made of his property" in the will "is a reasonable and proper one."

The disposition which a testator makes in his will may afford evidence for or against the validity of the will, sometimes very strong evidence, but always evidence that must be considered with great care; for no person is required to make a will such as others may think reasonable or proper; every one capable of making a will can be as unreasonable as he or she pleases. For any juror, Judge or Court, to act with any degree of confidence upon the little, shallow, and narrow knowledge of all the circumstances affecting the mind of any one in making his or her will, obtained in a short trial, circumstances sometimes extending over a long lifetime and sometimes secret circumstances, to form a confident judgment as to what dispositions of the property willed ought to have been, would be foolhardy, and pretty sure to afford additional proof of the truth of the saying that a little knowledge may be a very dangerous thing.

So, too, it is difficult for me to understand why, in the *Adams* will case, if the onus of proof rested on the beneficiary because of the manner in which the will was obtained, the dictum of Lord Cranworth, before mentioned, was not applied to him instead of to those who were opposing the will. In the case with which Lord Cranworth was dealing — *Boyse v. Rossborough* (1856), 6 H.L.C. 2—the onus of proof was upon those opposing the will. It had not been procured by the beneficiary—had been prepared by the testator's solicitor, and was executed in the absence of the beneficiary and in the presence of the testator's medical adviser and legal adviser—his family physician and solicitor. It is a poor rule that does not work both ways.

The "righteousness" of the dispositions made in the will in question has been the main ground of the argument made in support of it; but, if that righteousness is more accurately described as only the self-righteousness of the son Albert, the argu-

ment loses force. It is asked what else should the father have done but have given the bulk of his property to the son who was near him, and little to the son who roamed. Little to the son who complained somewhat bitterly to his father and mother when they did not help him and his wife in their want, though they had given \$500 to his brother upon his marrying; and who successfully opposed his brother, and possibly his father, in an attempt to pay some of the debts of the father out of the money coming to this son under his mother's will.

But, as I have already said, this is dangerous ground—ground upon which conceit alone can make one feel that he has a firm footing. And, besides that, we all know how prodigal sons are often treated; that the ninety and nine are sometimes left when the lost one is sought for, even though sometimes a very black sheep; help given to those who need it, not to those without need; that even an Esau's first-born right could be taken from him only by deception.

And, besides all this, the plaintiff seems to be a man of whom his father had no more reason for being ashamed than he had of his son Albert; not a word was said against his moral and business standing in the community; and that his mother was not turned against him, her letter in answer to his request for money, as well as her death-bed desire to put her two sons on an equal footing, shews. Nor did the father remain resentful, if he ever were resentful, as his affectionate letter, written after his wife's death, to the plaintiff, shews; the letter from which I have quoted, and a letter which contains these words also: "do not see my way clear as yet to come down; would like nothing better than to come to Hamilton for a week or two, as I think it would do me a great deal of good;" and "I give my love to all; I give my love to you and Maggie; this letter is not from mother, but don't I wish it was, but from your father, John Lloyd."

So too in regard to the contest over the accounts rejected in administering the mother's estate; in the hours spent by the plaintiff with his father after the operation, the same fatherly, affectionate spirit prevailed; why should there be resentment when the plaintiff was seeking and got only the whole of the lesser

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share of his mother's estate of which it was sought unjustly to deprive him of part; as the Surrogate Court Judge's judgment shews?

That there was resentment, and more than resentment, on the part of the brother Albert, the circumstances attending their mother's will and death, and the circumstances attending the operation, as well as the testimony of the plaintiff, all make plain; a resentment continuing until the present day and evidenced on the day of their father's funeral in the refusal to have his brother at his house on the paltry excuse that they were to have only a cold dinner, an excuse rebuked humanely and not unfilially in the spontaneous words of his daughter: "But surely, father, we shall have enough for uncle Frank too," or words to that effect.

I see no reason why the father might not have desired very reasonably to put his two sons on an equal footing in regard to such of his property as his son Albert had not already absorbed. But I place no great weight upon this consideration. No two men are quite alike; and every man may do as he wills with his own; so, even if it were possible to know all that a testator knew, it would yet be unwise to imagine that one knew what he would do in such circumstances.

The onus of proof is upon the son Albert; he has not satisfied it; he has not satisfied the conscience of this Court that the paper writing in question is and contains in truth the last will of John Lloyd, deceased; and that is enough for the determination of the case adversely to those parties to this action who support the will.

And, if it were necessary to go further, my finding upon the whole evidence would be: that it is not the last will of John Lloyd; that, although it was the voice of John Lloyd that gave the instructions, and spoke at the execution of the will, it was the hands of his son Albert that pulled the strings, as I have already said—that it is in truth his will.

It was said, and rightly said, that the last will of one who is dead should be inviolable. Assuredly it should, whatever juror, Judge or Court, might think of the wisdom or unwisdom of its provisions; but that makes it only the more essential that it shall

be proved to be a last will before being accorded that inviolability; and not only is that so, but every heir at law has a right to proof that he has been deprived rightly of the property birth-right which the law gives him, by reason of heirship, unless cut off from it by the freewill of him who owns it. And, when one of two brothers obtains from their father, a feeble man and old—infirm and old in mind and body and partially deaf—with no one but the one son to confide in, and dependent much upon—obtains from such a father a large share of his brother's birth-right, by deed as well as will, the proof required should be convincing, and the more so because the will, if really the will of the father, could so easily have been proved to be his will. However it may have been morally, it was not in law needful that the brother should have been informed of the will and given an opportunity to inquire as to its validity of his father, in his lifetime; but, at the least, some independent person should have made the inquiry and have learned the truth, the truth which a mere reading over of the will, with the son obtaining it no further away than the other side of the door when read over and signed, might be far from revealing. Instead of that, the absent brother was, intentionally I find, kept in ignorance of his father's dangerous illness until too late to see him before the operation—an operation often fatal at his age—took place. Nor was any kind of inquiry made, even by the solicitor, with a view to learning the condition of the mind of the man or whether the will was really his own will.

It must be adjudged, accordingly, that the will in question, in so far as it confers any benefit upon any party to this action, is not the will of John Lloyd, deceased.

By some oversight, none of the beneficiaries, except the two sons, is a party to this action; indeed, the son Albert was not made a party to it until the trial of it. No judgment or order can therefore be made affecting the rights of the other beneficiaries. The result is, that the will stands as to all their rights under it, and there is, and may be adjudged to be, an intestacy as to the rest of the estate.

Under ordinary circumstances, the plaintiff would have been

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awarded his costs from those who supported the will and failed; but, as the son Albert was not made a party until the trial, and then of course only with his consent, he ought not to be ordered to pay any costs but those of the trial.

Executors supporting a will, and failing, should ordinarily pay costs personally and look to those who have indemnified them for reimbursement; if indemnified as they should be; but, whether indemnified or not, should not have costs out of the estate ordinarily. But this case is not an ordinary one, because of the failure to bring all proper parties before the Court, with the result that the attack upon the whole will fails in part.

Under all the circumstances of the case, the proper disposition as to costs is that the defendant Albert Lloyd pay to the plaintiff the costs of the day of the trial, fixed at \$100, and that no other order as to costs, in any respect, be made; it may be ordered accordingly.

Proceedings upon my findings and order are to be stayed for one month, so that the parties may have time to consider the question of appealing against them before they are acted upon.

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[MIDDLETON, J.]

Jan. 4.

MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Accident Insurance—Bodily Injury—Accidental Means—Sprained Wrist—Recovery Delayed by Presence of Disease in System—Disability Caused Exclusively by Accident—"Total Disability"—Findings of Fact of Trial Judge.

By a policy issued by the defendant company, the plaintiff was insured against "bodily injury sustained . . . through accidental means . . . and resulting, directly, independently, and exclusively of all other causes, in an immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation . . ." The plaintiff's occupation was that of an eye, ear, nose, and throat specialist. While travelling upon a railway train, he was thrown or fell from an upper berth in a sleeping-car, as the result of which the wrist of his left hand was badly sprained; after the lapse of two and a half years his arm had not recovered, and any future recovery was problematical; the arm was useless to the plaintiff, by reason of its swollen condition and rigidity. In this action the plaintiff, alleging total disability, sought to recover \$150 a week for thirteen weeks from the 1st March, 1915, to the 30th May, 1915—the accident having occurred on the 30th May, 1913:—

Held, upon the evidence, that the condition of the arm was referable, to some extent at least, to the presence in the plaintiff's system of tuberculosis; but, nevertheless, that the bodily injury resulted, independently and exclusively of all other causes, in the plaintiff's total disability; the disease which had intervened was not another cause within the meaning of the policy—the tuberculosis was in the system, but was harmless until, as the direct result of the bodily injury, it was given an opportunity to become active.

Coyle or Brown v. John Watson Limited, [1915] A.C. 1, *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, and *Youlden v. London Guarantee and Accident Co.* (1912-13), 26 O.L.R. 75, 28 O.L.R. 161, followed.

Held, also, upon the evidence, that the plaintiff's injury entirely precluded him from doing any special work on the eye, ear, nose, and throat—and that constituted "total disability" within the meaning of the policy.

ACTION to recover \$1,950, for disability payments, under an accident insurance policy issued by the defendant company to the plaintiff.

December 7, 30, and 31, 1915. The action was tried by MIDDLETON, J., without a jury, at Sarnia and Toronto.

W. N. Tilley, K.C., and J. H. Fraser, for the plaintiff.

R. McKay, K.C., and Gideon Grant, for the defendant company.

January 4, 1916. MIDDLETON, J.:—The plaintiff seeks to recover \$1,950, being a quarterly payment alleged to be due under a policy issued by the defendant company on the 10th February, 1913, in respect of payments for disability, at the rate of \$150 per week, during the thirteen weeks from the 1st March, 1915, to the 30th May, 1915.

In its defence the defendant company admits that it did "insure the plaintiff against bodily injury resulting in total disability," and denies that the plaintiff did sustain any bodily injury or suffer total or permanent disability. It also alleges that, if the injury stated was sustained, there had been total recovery therefrom, and, if there had not been total recovery, "it was by reason of his not securing any or proper medical attention and treatment for the alleged injury, and by reason of the plaintiff fraudulently preventing his alleged injury from healing and his recovery therefrom." At the trial an amendment of the defence was permitted by which it was alleged that the "injury sustained by the plaintiff did not, independently and

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exclusively of all other causes, result in immediate, continuous, and total disability," and that certain warranties in the application for insurance were untrue, and that by reason thereof the policy is void.

The plaintiff is a medical doctor, who, at the time of the issuing of the policy in question, practised his profession as an eye, ear, nose, and throat specialist at Valparaiso, Indiana. The terms of the policy are all-important in view of the issues raised at the hearing. By it the plaintiff is insured against "bodily injury sustained . . . through accidental means . . . and resulting, directly, independently, and exclusively of all other causes, in an immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation. . . ."

If the assured suffers total disability, the company will pay him, so long as he lives and suffers the total disability, \$75 a week, which amount is doubled if the injury is sustained while the assured is in or on a public conveyance.

While the policy was in force, on the 30th May, 1913, the plaintiff, travelling as a passenger upon a railway train, was thrown or fell from an upper berth in a sleeping-car, as the result of which the wrist of his left hand was badly sprained; and, although some two and a half years have now passed, the arm has not yet recovered, and any future recovery is problematical.

At the trial, much medical evidence was given with a view of explaining the cause of this delay in the healing of an injury from which recovery would ordinarily be expected within about six months.

In the first place, I am quite satisfied that there is no foundation whatever for the defence originally pleaded. The plaintiff has throughout submitted himself to the defendant's physicians, and has sought to follow their advice. He has, I believe, honestly done his best to bring about recovery, and there is no kind of foundation for the suggestion, which I venture to think ought never to have been made, charging him with fraudulently preventing recovery from his injury. Nor has his recovery been prejudiced or delayed by the use made of his automobile.

The exact cause for the delayed recovery is not by any means easy to ascertain. It must be sought in the evidence of Doctors Starr, Mabee, and Anderson. The suggestion is made by the defendant that the arm became infected by reason of the existence in the plaintiff's system of latent germs of tuberculosis.

At the trial the defendant company was not content to rest upon a general suggestion of infection, or the more particular suggestion of infection by tuberculosis, but sought to establish that the plaintiff had suffered from syphilis, and that the condition of his arm was the result of that malady. I accept the plaintiff's evidence that he had never suffered from this disease, and I do not think that the medical evidence on behalf of the defendant company, quite apart from the plaintiff's denial, was sufficient to substantiate the allegation. I cannot help expressing my regret that the defendant saw fit to make this charge upon so slight a foundation.

At the present time the injured arm is useless to the plaintiff, by reason of its swollen condition and rigidity. This condition is brought about by fibrous growth and inflammation of the tendon sheaths. So far as the condition of the arm can be ascertained from most careful examination and from X-ray photographs, there is not active tuberculosis in the arm. If the disease were there, active, as explained by Doctors Starr and Mabee, there would by this time be a far more serious and acute condition manifest; but, in view of the evidence of Doctor Anderson, as well as of the evidence of the two medical experts called by the plaintiff, I cannot help feeling that the condition of the arm can only be explained by the presence in the plaintiff's system of tuberculosis in some form. From Doctor Anderson's evidence it is clear that, prior to the accident, there had been a tuberculous lesion in the lung. This had apparently completely healed, and no doubt the plaintiff was entirely unaware of his ever having been diseased in this way. From seventy-five to ninety per cent. of all human beings have tuberculosis to a greater or lesser degree at some time of their existence. A very small portion of these are ever aware of the fact. The lesions are discovered upon an autopsy, or blood-tests made during life may disclose the fact. Upon the happening of an

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accident such as that which befell the plaintiff, the general vitality and power of resistance is lowered. The injured tissues form a good seed-bed, and the disease germs present in the blood, which would otherwise be innocuous, find a lodgment and an opportunity for growth. That this is what happened to the plaintiff is apparent from the fact that, not long after this accident, all the symptoms of tuberculosis became apparent. He had afternoon temperature and night sweats, and lost thirty pounds in weight. Following expert medical advice, he has taken up his abode at Swastika, in Northern Ontario, and the progress of the disease appears to have been arrested, at any rate to some extent, and it is possible that in course of time there may be improvement and even ultimate recovery; but up to the present time I think it is clear that the condition of his arm is such as to amount to complete disability within the meaning of the policy.

What the policy insures against is immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation. By the application, his business is given as that of eye, ear, nose, and throat specialist, and the "duties of his occupation" (the words used in the policy) are described as "special work on eye, ear, nose, and throat." It was argued that because certain work, e.g., testing an eye for the fitting of glasses, could be done even by a one-armed man, and other things might be done with the aid of a trained assistant, there could not be total disability.

I do not think that this is so; but in this case it is quite clear to me that the plaintiff's injury entirely precludes him from doing any special work on the eye, ear, nose, and throat, which is, as I understand it, the thing that constitutes "total disability" within the meaning of the policy.

A more serious difficulty for the plaintiff, however, is that raised by the amendment made at the trial; for it is said that the bodily injury sustained by him did not result, "independently and exclusively of all other causes, in" his total disability; for the disease which has intervened, and which to some extent at any rate is said to be responsible for the present condition, is another cause within the meaning of the policy.

I have come to the conclusion that this is altogether too narrow a reading of the policy, and that there is a diseased condition of the arm, which thus far has resulted in total disability, and that this diseased condition is the direct result of the bodily injury sustained by the plaintiff when he fell from the berth in the sleeper. The tuberculosis of the system was harmless until, as the direct result of the accident, it was given an opportunity to become active. This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident.

In the case of *Coyle or Brown v. John Watson Limited*, [1915] A.C. 1, the reasoning of the Lords appears to me to be conclusive and in the plaintiff's favour. A wreck took place in the shaft of number 2 pit of a mine. The men were ordered to ascend by the shaft of number 1 pit, this being the downcast shaft for the air-current which ventilated the mine. There they had to wait for some time, exposed to the cold down draft. As the result of this exposure, the deceased caught a chill, which brought on pneumonia, from which he died. The plaintiff claimed that the death resulted from the exposure consequent upon the wreck in shaft number 2, and that there was therefore liability; for the death, it was said, resulted from an injury by accident in the course of the employment of the deceased. There was an accident in the mine, and "there is no intervening circumstance depending on some cause other than the accident which occurs to break the chain of causation."

If, instead of a sprain, the plaintiff's arm had been broken, and disease had followed as the result of the laceration of the flesh, could it have been argued that the bone would not have broken if it had not been abnormally weak, and that the laceration of the flesh would not have occurred but for this abnormal weakness? The breaking of an abnormally weak bone would in one sense have caused the disability; nevertheless, there would have been the right to recover. It seems to me that there is liability in every case where the resulting disability directly flows from the accident, which alone disturbs the pre-existing condition of health, and that the provisions of the policy do not avail the defendant where the most that can be found is that the

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conditions disturbed were less stable because of some pre-existing infirmity. In this case the tuberculosis was latent, and would have remained harmless had it not been for the accident. The disease is, as already said, the direct consequence of that accident.

This is not the case of a pre-existing disease which would sooner or later cause the condition complained of, nor is it the case of some disease intervening as an independent cause after the accident. It is the case of an old malady, cured in the sense of being quite inactive and innocuous, but which had induced such a bodily condition at the time of the accident as to render recovery from the effects of the accident much slower and more difficult than it would otherwise have been.

When one considers how the advance of medical science has enabled the progress of disease to be followed, and how the chain of occurrences from the "accident" to disability or death is now understood, and how each change in that progression may be said to be caused by the conditions that preceded it, and to be itself a cause of the conditions which follow, and how in every change there is always the co-operation of concurrent conditions, it would require a policy to be expressed with great clearness before the Court would be justified in relieving the defendant from liability simply because at some stage of the process it was possible to point out that there was a concurrent influence at work aiding in the process.

It is a fundamental principle of modern surgery that any wound which does not heal at once by "first intention" refuses so to heal because of some infection or germ which has reached the wound in some way. This germ may be in some sense a cause of the continuance of the wound and of its delay in healing, but it cannot be regarded as an intervening cause within the terms of this policy.

So here, the germs present in this man's blood are not different in principle from the septic germs which originate putrefaction, everywhere present when conditions are not entirely aseptic, and cannot be regarded as other causes intervening to bring about the injury. Their lodgment in the wounded tissue is as much the consequence and effect of the accident as the carrying

of the germs into the wound in *Mardorf v. Accident Insurance Co.*, [1903] 1 K.B. 584, or the lodgment of the germ of pneumonia in the collier's lung in *Coyle or Brown v. John Watson Limited*, *supra*. See *Beare v. Garrod* (1915), 113 L.T.R. 673.

This appears to me to be in accordance with *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; followed in *Youlden v. London Guarantee and Accident Co.* (1912-13), 26 O.L.R. 75, 28 O.L.R. 161. These authorities appear to bind me, and I think are to be preferred to American cases, of which *Penn v. Standard Life and Accident Insurance Co.* (1911), 42 L.R.A. (N.S.) 593, may be regarded as a type.

There will, therefore, be judgment for the plaintiff for the amount claimed, with interest and costs.

[IN CHAMBERS.]

REX v. CLIFFORD.

Criminal Law—Indecent Act—Public Place—Criminal Code, sec. 205—Conviction—Information—"Wilfully"—Amendment—"Place to which Public Permitted to have Access"—"In the Presence of one or more Persons."

Section 205 of the Criminal Code provides: "Every one is guilty of an offence . . . who wilfully (a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access:"—

Held, that an information charging an offence against this section was defective in omitting to charge that the act was done "wilfully;" but the defect might be supplied by amendment, after conviction by a magistrate, the evidence disclosing the wilful nature of the act.

(2) That the magistrate was justified in finding that a "massage parlour," to which apparently all comers were admitted, was a "place to which the public . . . are permitted to have access."

Rex v. Cook (1912), 27 O.L.R. 406, distinguished.

(3) That an abominable act of indecency committed by the defendant in her "massage parlour," no person being present except the man who was a party to it, did not come within the section—it is enough that one person should be shewn to be present, but it must be a person other than those engaged in the offence.

Regina v. Watson (1847), 2 Cox C.C. 376, and *Elliot's Case* (1861), L. & C. 103, referred to.

MOTION by Florence Clifford to quash her conviction by the Police Magistrate for the City of Toronto for committing an in-

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decent act in a public place, contrary to sec. 205 of the Criminal Code.

January 6. The motion was heard by MIDDLETON, J., in Chambers.

T. C. Robinette, K.C., for the applicant.

Edward Bayly, K.C., for the Crown.

January 8. MIDDLETON, J.:—The accused is a woman who advertised massage treatment. The evidence discloses that this is a mere cloak for flagrant immorality; and that, upon the witness for the Crown going to this woman's residence, an abominable offence against morals was committed by her. No one else was present, and the witness and the woman were both parties to the indecent act deposed to.

The information in the case is defective, as it omits to charge that the act was done "wilfully," which is essential: *Ex p. O'Shaughnessy* (1904), 8 Can. Crim. Cas. 136; *Rex v. Tupper* (1906), 11 Can. Crim. Cas. 199; *Rex v. Barre* (1905), 11 Can. Crim. Cas. 1. This is, however, a matter that can be cured by amendment, for the evidence undoubtedly discloses the wilful nature of the act.

The most serious question is, whether the act of immorality disclosed brings the case within the provisions of the statute. Omitting immaterial words, the statute (Criminal Code, sec. 205) provides: "Every one is guilty of an offence . . . who wilfully (a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access."

With every desire to uphold this conviction if possible, I am driven to the conclusion that the misconduct complained of is not within the statute. The two parties to the offence were alone present, and I do not think that the statute aims at the punishment of an act of indecency unless there is some third person present at the time of the occurrence.

The wording of the statute, bearing in mind the history of the law relating to the offence in question, is singularly unfortunate, and probably, in an endeavour to remove doubt with

regard to one particular matter, the common law has been much narrowed.

In Stephen's Digest of the Criminal Law, 6th ed., p. 132, the common law is accurately summarised thus: "Every one commits a misdemeanour who does any grossly indecent act in any open and public place in the presence of more persons than one. . . . A place is public within the meaning of this Article if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look."

The words "place" and "public place," as has been more than once pointed out, are exceedingly elastic, and the meaning must be determined having regard to the context and the purview of the legislation. The meaning attributed to the words by Stephen, in his endeavour to formulate the common law, is well justified by the cases, more particularly by the case of *Regina v. Wellard* (1884), 14 Q.B.D. 63, in which a conviction for indecent exposure in a public place was upheld, where the place was one to which the public had no right of access, but where trespass was freely permitted without interference.

In the English statute "any public and indecent exposure of the person" is prohibited. The wording of this statute is in accordance with the common law theory. The offence is in the nature of a nuisance; the exposure or the indecent act being punishable because made or done in such a place that it would offend the public or members of the public.

In numerous English cases the offence was committed on private property, but in such a place as to be easily visible to passers-by or the occupants of adjacent houses: e.g., *Thallman's Case* (1863), L. & C. 326.

Unfortunately, in our statute this element of visibility to the public seems to have been lost sight of, and the act is punishable only when committed in any place to which the public have or are permitted to have access. I draw attention to this, hoping that Parliament may see fit to amend the statute by adopting the phraseology of the English statute (14 & 15 Vict. ch. 100, sec. 29).

In the Liquor License Act, as amended in 1912, by 2 Geo. V. ch. 55, sec. 13, a penalty is imposed upon any person found in-

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toxicated "upon a street or in any public place." My brother Kelly, in *Rex v. Cook* (1912), 27 O.L.R. 406, thought that the rule of *ejusdem generis* applied, and that the meaning of the words "or in any public place" in that statute was coloured by the words "upon a street," immediately preceding, and indicated that the public place referred to in that statute must be a place to which the public had access as of right, and therefore did not apply to an hotel.

While this decision is, no doubt, right as far as that statute is concerned, I am not prepared to hold that it applies to the statute now under consideration; and I think that the statute in hand may well be interpreted so as to include any place to which the public have access as of right or by the invitation or permission of the owner; and I would think that in this case the magistrate was justified in finding that this massage parlour, to which apparently all comers were admitted, was a place to which the public "are permitted to have access," within the statute.

But this is not enough to enable me to sustain the conviction; for it is of the essence of the offence that it should be committed "in the presence of one or more persons;" and I do not think that this is satisfied by holding that the man who participates in the offence is "a person" contemplated by the statute.

Because the common law offence was punished as an outrage upon the persons in whose presence it was committed, it was thought that there could be no punishment if the offence was committed merely in the presence of one person; and it is, no doubt, to get over this difficulty that the English statute already quoted was passed.

In *Regina v. Watson* (1847), 2 Cox C.C. 376, Chief Justice Denman, in quashing an indictment of this nature, said: "The general rule is, that a nuisance must be public; that is to the injury or offence of several." And in *Elliot's Case* (1861), L. & C. 103, where two persons committed fornication in sight of one witness only, it was held that there could be no conviction; shewing that a party to the offence could not be regarded as a person offended thereby. Our statute makes it enough that one person should be shewn to be present, but I think it follows that

he or she must be a person other than those engaged in the offence.

To hold otherwise would be to render punishable under this section many acts which it is generally assumed our law does not reach, and to render unnecessary all the provisions of the Code with respect to the punishment of inmates and frequenters of houses of ill-fame.

The state of affairs disclosed in the evidence seems to call urgently for legislative interference, but cannot justify an undue straining of the statute passed *alio intuitu*.

The conviction will, therefore, be quashed, without costs, and with an order for protection.

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CAPLIN V. WALKER SONS.

Master and Servant—Injury to Servant—"Services of Workman Temporarily Let or Hired to Another"—Defective Condition of Works—Action against Hirer—Remedy under Workmen's Compensation Act, 4 Geo. V. ch. 25(O.)—Knowledge of Defect—Voluntary Assumption of Risk.

The plaintiff, a teamster employed by persons who did a teaming business, was sent by his employers with a team of horses to work in the yard of the defendants. While working there he received an injury which, he alleged, arose from a defect in a truck of the defendants which he was endeavouring to move with his employers' team; and he brought this action to recover damages for his injury:—

Held, that the plaintiff was a workman temporarily let or hired to another by his employers, who continued to be his employers, and that he could not maintain the action: his rights, if any, were to be worked out under the provisions of the Workmen's Compensation Act, 4 Geo. V. ch. 25(O.)

There was at most a failure on the part of the defendants to provide proper and adequate machinery, plant, or equipment; and that could create no direct liability for injury to the plaintiff, who was not employed by them. There was nothing in the nature of a trap or pitfall which might give a right of action in case of injury to even a bare licensee.

Sections 2, sub-sec. 1(f), 4, 5, 9, 10, 13, and 15 of the Act, considered.

Held, also, upon the evidence that the plaintiff knew of the defect, and, knowing and appreciating the risk, voluntarily assumed it.

The action was dismissed without costs.

ACTION to recover damages for injuries sustained by the plaintiff by reason of the negligence of the defendants, as the plaintiff alleged.

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The action was tried by LENNOX, J., without a jury, at Sandwich.

F. C. Kerby, for the plaintiff.

A. J. Gordon, for the defendants.

January 8. LENNOX, J.:—The plaintiff at the time of the accident was a teamster in the employment of George Nevin & Sons, persons carrying on a general transfer, cartage, and heavy teaming business. The business of the employers was of the character described in class 30 of schedule 1 of the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.) It would also come under what is constituted "a separate group or class" by sec. 73; "teaming" being one of the classes there specifically mentioned. It would not come within the classes of trade or business embraced in schedule 2.

About the 25th February last, the plaintiff was sent by his employers to work in the yard of the defendant company with his employers' team, and while there he was to perform such services in the way of team work as the defendants might require or direct; he was "a workman temporarily let or hired to another" by his employers, and Nevin & Sons continued to be his employers, as defined by clause (f) of sub-sec. 1 of sec. 2 of the Act.

The question is raised as to whether the plaintiff can maintain this action, or is limited to obtaining compensation, as a servant of Nevin & Sons, out of the accident fund. Section 10 will not, I think, help the plaintiff; for the employer, if liable, is not "individually liable," which, as I understand it, is the liability of the employer of the class embraced in schedule 2 only; and, even if sec. 10 applies, his claim would still be for compensation, and not for damages recoverable by action. "Employers in the industries for the time being included in schedule 2 shall be liable individually to pay the compensation:" sec. 4. "Employers in the industries for the time being included in schedule 1 shall be liable to contribute to the accident fund as hereinafter provided, but shall not be liable *individually* to pay the compensation:" sec. 5.

It is true that sec. 9 provides that "where an accident happens to a workman in the course of his employment under such circumstances as to entitle him or his dependants to an action against some person other than his employer," he may have the alternative of an action; but the difficulty as to this is, that here there was at most merely a failure on the part of the defendant company to provide proper and adequate machinery, plant, or equipment; and, whatever common law liability this might create in case of injury to one of their own employees, it could create no direct liability for injury to the plaintiff, where, as here, the relation of employer and employed did not exist. It was not anything in the nature of a trap or pitfall, giving a right of action in case of injury to even a bare licensee.

The common law obligation to provide adequate equipment or pursue a proper system is not a general obligation, but a duty arising out of contract to protect their workmen and servants from unreasonable risks.

There are expressions in the judgments in *Cory & Sons Limited v. France Fenwick & Co. Limited*, [1911] 1 K.B. 114, which might be regarded as favourable to the plaintiff, but they are not involved in the decision; and Halsbury refers to the case as authority for saying that "the workman cannot claim compensation from the person to whom he is lent or hired, though such person for the time may exercise over him all the rights of a master" (vol. 20, para. 421). And "no right to indemnity is reserved as against the temporary employer:" note (t) to para. 421. *Mulrooney v. Todd*, [1909] 1 K.B. 165 (C.A.), and *Skates v. Jones & Co.*, [1910] 2 K.B. 903 (C.A.), may be referred to. The English Employers Liability Act, and the difference in the provisions of the English Compensation Act, are to be kept in mind.

I can see no other provision that would even argumentatively include the application of the Act.

On the other hand, sec. 13 declares that "no action shall lie for the recovery of the compensation" of any kind, and all claims shall be determined by the Board. See also sec. 15. I am of opinion, then, that the plaintiff's rights, if any, are to be

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worked out under the provisions of the Workmen's Compensation Act.

But the Act, although the only objection urged, does not appear to me to be the only obstacle in the plaintiff's way. Aside altogether from this, I am very far from being convinced that the plaintiff is entitled to damages recoverable by action. I expressly refrain from expressing any opinion as to what his rights may be against his employers, upon proceedings taken under the Act. Leaving that question open, the plaintiff knew that the hammer-strap was broken, and that there was nothing to hold the top of the bolt.* As a teamster he would know and appreciate the necessity and purpose of a strap, and that the smaller the bolt used the greater the need—as well because a smaller bolt had less strength *in any position*, as that, not fitting snugly in the hole, it would inevitably tilt forward and so be liable to bend, break, or pull out as the team pulled upon it.

Without objection on his part, he discarded the stronger bolt provided by the defendant company—a bolt which, fitting snugly and standing upright and at right angles to the draught, would not be likely to pull out; and, without any direction from the yard foreman, and it may be without his knowledge, substituted a smaller bolt from his own waggon. It was this bolt that bent and drew out, and it was this, and not anything provided by the defendants, that was the immediate cause of the injury. He knew of the defect, and, as a teamster, he must at least be taken to have appreciated the danger as fully as the foreman. Knowing and appreciating the risk, he voluntarily assumed it; he was the author of his own misfortune.

Upon both grounds I think the action fails.

*The allegation in the statement of claim, para. 3, was as follows: "The plaintiff and team were put to work by the defendants in moving heavily laden lumber-trucks about the yards of the defendants; the wheels of the trucks being frozen in standing water in the yards, the draught being very heavy and up-grade, the double-trees to which the horses were attached being held by draw-bolt only, the usual hammer-strap for safety and for sustaining the draw-bolt being negligently absent, the draw-bolt drew out under the strain, releasing the double-trees, causing the team to lurch forward suddenly, instantly dragging the plaintiff off the load and causing him to fall a distance of about 10 feet to the frozen ground, dislocating and injuring his ankle-joint and heel, from which injuries he was incapacitated for work, and became a cripple."

The objection taken at the trial involves the construction of a new statute and is not free from difficulty. I do not think I should make the plaintiff pay costs. The action will be dismissed without costs.

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[APPELLATE DIVISION.]

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TRAVATO V. DOMINION CANNERS LIMITED.

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Writ of Summons—Failure to Serve—Renewal after Expiry of Year—Limitation of Actions—Workmen's Compensation for Injuries Act, sec. 9—Revival of Action after Statutory Bar—Claim at Common Law not Barred—Effect of—Right to Bring New Action.

Where, owing to the expiry of the writ of summons, a cause of action has become barred by a statute of limitation, leave to renew the writ *nunc pro tunc* ought not to be granted.

Doyle v. Kaufman (1877), 3 Q.B.D. 7, 340, and *Hewett v. Barr*, [1891] 1 Q.B. 98, followed.

The action was brought at common law and under the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, to recover damages for injury sustained by the plaintiff while in the employment of the defendant company. The injury was on the 6th September, 1913; the action was begun on the 5th March, 1914; and the cause of action (if any) under the Act was barred at the expiration of "six months from the occurrence of the accident causing the injury" (sec. 9), unless kept alive by the issue and renewal of the writ of summons. On the 16th August, 1915, after the writ had expired, no valid service having been effected, an order was made for its renewal, and it was renewed and served; but the order and the renewal and service were set aside by an order of CLUTE, J., affirmed by a Divisional Court of the Appellate Division.

Semble, that no case was made for renewing the writ, even if a renewal would be permitted to revive a cause of action which had become barred.

And *held*, that the fact that the common law cause of action was not barred afforded no reason for allowing that to be done which would revive the cause of action that was barred. The plaintiff would have the right to bring a new action at common law.

MOTION by the defendant company by way of appeal from an order of Mr. N. F. Paterson, K.C., Registrar of the Appellate Division, and an Official Referee, holding Chambers in place of the Master in Chambers, allowing the plaintiff to renew the writ of summons, and to set aside the order and the renewal of the writ pursuant thereto.

September 2, 1915. The motion was heard by CLUTE, J., in Chambers.

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W. Morrison, for the defendant company.

A. W. Langmuir, for the plaintiff.

CLUTE, J. (on the same day):— Motion to set aside a renewal of the writ of summons herein. The writ of summons was issued in the county of Norfolk on the 5th March, 1914, the plaintiff, by the endorsement, claiming damages for injuries received by him while employed by the defendant company. The plaintiff claims at common law and also under the Workmen's Compensation for Injuries Act. The writ of summons was renewed on the 4th March, 1915, by His Honour Judge Monck, Local Judge in Chambers at Hamilton, in the county of Wentworth. The renewal was set aside by order of Mr. Justice Middleton on the 9th April, 1915. Mr. N. F. Paterson, acting for the Master in Chambers, renewed the said writ by order dated the 16th August, 1915. He states the facts as follows:—

"The plaintiff, a minor, whilst in the employment of the defendant company, on the 6th September, 1913, was injured, and was and still is a paralytic, confined to his bed, and may never recover. He lives in Buffalo, New York.

"In the fall of 1913, instructions were given to a firm of solicitors in the town of Simcoe, where the accident happened, to bring an action against the defendant company for damages under the Workmen's Compensation for Injuries Act and at common law. For some reason, unexplained by the solicitors, the writ was not issued until the 5th March, 1914, when it was issued at Simcoe, in the county of Norfolk.

"The plaintiff, in the winter of 1913-14, retained J. H. Klein, an attorney in Buffalo, to look after his case.

"In an affidavit, Mr. Klein sets forth the fact of his having been retained to advise with the plaintiff's solicitors with a view to expediting the action, and that, on more than one occasion, when in Simcoe, he inquired of Mr. Winter, the member of the firm having charge of the action, to know if the writ had been served, and was advised each time that it had not been, but that he would immediately attend to it; that subsequently, in reply to a telephone message, Mr. Winter again assured him that he would see that the writ was served; that on the 16th February, 1915, he wrote to Winter, referring to his visits to Simcoe in October and

November, 1914, and complaining of the delay, when Winter assured him that the writ would be served next day; that on the 26th February following he spoke over the telephone to Mr. Winter's partner, Mr. Atkinson, who replied that he knew nothing of the case, and knew nothing about Mr. Winter, who was personally looking after the case; that, shortly before the date on which the writ would expire, he learned that the writ had not been served; he then telephoned Bruce, Bruce, & Counsell, of Hamilton, solicitors, to see that the plaintiff's interests were protected.

"Mr. Counsell, in his affidavit, states that he received instructions from Klein on the 3rd March, 1915; that he at once wired and wrote Atkinson & Winter: 'Has writ been served? If not, forward original and copy for service;' that on the 4th March he obtained an order from Monck, Local Judge of Wentworth, renewing the writ. The writ was served on the 19th March, 1915. On the 26th March, 1915, the defendant company moved before Middleton, J., to set aside the order for renewal and the service of the writ, and that learned Judge made an order setting aside the renewal and service, the contention having been that Judge Monck had no jurisdiction as a Local Judge, the action not having been begun in the county of Wentworth.

"Mr. Morrison contends that the delay has been inexcusable, and that the writ having lapsed, as the effect of the order of Mr. Justice Middleton, the action under the Workmen's Compensation for Injuries Act is barred by the six months' limitation under that Act, and refers to *Doyle v. Kaufman* (1877), 3 Q.B.D. 7, 340."

In *Doyle v. Kaufman*, 3 Q.B.D. 7, it was held by Cockburn, C. J., that the Court has no power to extend the time for renewing the writ of summons where the claim would, in the absence of such renewal, be barred by the Statute of Limitations. In appeal the Court (Bramwell, Brett, and Cotton, L.JJ.) intimated that, in their opinion, the principle of the judgment was right, but dismissed the application on the ground that the plaintiff himself had been guilty of such laches as disentitled him to a renewal of the writ.

In *Hewett v. Barr*, [1891] 1 Q. B. 98, *Doyle v. Kaufman* was followed by the majority of the Court, Lopes, L. J., observing

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that the practice as laid down in that case had been followed ever since. Kay, L. J., was disposed to think that Order LXIV., r. 7, might be so construed as to give the Court power to renew the writ under exceptional circumstances.

Having regard to these cases, I am unable to agree with the learned acting Master in Chambers that the renewal of the writ in this case can be supported. The motion must be allowed, and the renewal of the writ set aside.

This is not a case for costs.

The plaintiff appealed from the order of CLUTE, J.

November 11, 1915. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ. A.

A. W. Langmuir, for the appellant, contended that the renewal of the writ was properly allowed by Mr. Paterson: *Darby & Bosanquet's Statutes of Limitations*, 2nd ed., p. 559 *et seq.*; *Halsbury's Laws of England*, vol. 19, para. 389, p. 188. Even though the twelve months had elapsed, the Court had jurisdiction to grant the motion: *Re Jones*, *Eyre v. Cox* (1877), 46 L.J. Ch. 316; *Williams v. Harrison* (1903), 6 O.L.R. 685. The discretion of the Registrar, sitting for the Master in Chambers, in granting the renewal, could not be interfered with: *Canadian Bank of Commerce v. Tennant* (1903), 5 O.L.R. 524; *St. Louis v. O'Callaghan* (1889), 13 P.R. 322. While the writ was overdue, it was still more than a nullity: *In re Kerly Son & Verden*, [1901] 1 Ch. 467.

W. Morrison, for the defendant company, respondent, contended that where the writ had not been served within the twelve months, and the cause of action had in the meantime become barred by a statute of limitations, the Court would not grant a renewal: *Doyle v. Kaufman*, 3 Q.B. D. 7; *Hewett v. Barr*, [1891] 1 Q.B. 98; *Magee v. Hastings* (1891), 28 L.R. Ir. 288.

Langmuir, in reply.

January 10, 1916. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from an order of Clute, J., dated the 2nd September, 1915, setting aside an order dated the 16th August, 1915, made by an Official Referee,

sitting for the Master in Chambers, allowing the renewal of the writ of summons after it had expired.

The action is brought to recover damages for personal injuries sustained by the appellant while employed by the respondent, which it is alleged were occasioned by the negligence of the respondent. The appellant's claim is based upon the common law as well as upon the Workmen's Compensation for Injuries Act.

The cause of action, if any there is, arose on the 6th September, 1913, when the appellant was injured.

The writ of summons was issued on the 5th March, 1914, and was not renewed until the 27th August, 1915, when it was renewed for one year from the 4th March, 1915, under the authority of the order of the 16th August, 1915.

The cause of action, if any, under the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, was barred at the expiration of "six months from the occurrence of the accident causing the injury," unless kept alive by the issue and renewal of the writ of summons (sec. 9), but the common law cause of action is not yet barred.

The acting Master in Chambers was of opinion that, in the circumstances disclosed in the affidavits, a case had been made for allowing the renewal, and that he had power to allow it, although the effect of the renewal would be to revive the right of action under the Act, which was barred.

According to these affidavits, Atkinson & Winter, solicitors in Simcoe, were retained by the appellant in the autumn of 1913, and a Buffalo solicitor named Klein was, in the spring of 1914, retained to advise with Atkinson & Winter, with a view to expediting the action. He deposed that on more than one occasion while in Simcoe—when, he does not say—he inquired of Mr. Winter whether the writ had been served, and was told by him on each occasion that it had not been, but that he would immediately attend to it; that he subsequently spoke of the matter by telephone to Winter, who again assured him that he would see that the writ was served; that on the 16th February, 1915, he wrote to Winter asking to be informed immediately whether or not the writ had been served, and recalling the fact that in the previous October and November he had been assured by Winter that he would serve the writ on the next day. He does not say

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whether he received any reply to his letter, or, if there was one, what it was. He further deposes that on the 26th February last he spoke by telephone with Mr. Atkinson, who informed him that Winter was seldom at his office, that he (Atkinson) knew nothing of the action, as it was being looked after by Winter personally, and that "he" (Atkinson) "would rather not be interested in it at all;" that "immediately thereafter," and shortly before the expiration of the twelve months from the 5th March, 1914—on what date he does not say—he ascertained that the writ had not been served, and that on the 2nd March, 1915, he instructed Messrs. Bruce, Bruce, & Counsell, of Hamilton, by telephone, to "see that the plaintiff's interests were protected."

According to Mr. Counsell's affidavit, this telephone message to his firm was received on the 3rd March, and it was a request to his firm to communicate with Atkinson & Winter and see that the writ was served; that he telegraphed them asking if the writ had been served, and asking them, if it had not been, to send it and a copy that day, if possible, for service. Mr. Counsell's affidavit is silent as to whether he received any answer to his telegram or to the letter which he sent on the same day confirming it. He on the 4th March applied to a Local Judge in Hamilton and obtained from him an order renewing the writ for "another twelve months," but this order was subsequently set aside. Since then he has taken the necessary steps to have the solicitors changed, and the plaintiff arranged to put up security for costs. He states that the delay in moving "for an order for renewal and leave to serve had been by reason of the plaintiff's financial condition," whatever that may mean. Mr. Counsell's affidavit was sworn on the 24th July, 1915, and the application to the acting Master in Chambers was made on the 14th August following. No affidavit has been made by Atkinson or Winter, nor has either of them been examined for the purpose of the motion.

The writ was issued on the 5th March, 1914, the last day of the six months within which the action must have been brought under the provisions of the Workmen's Compensation for Injuries Act. An affidavit of Mr. Morrison, the solicitor for the respondent, in answer to the application, was filed, and in it he deposes that in or about January, 1915, Klein informed him that the writ had been issued; that he would have it served; and that

he intended seeing Mr. Counsell and "directing him to do the same." There is no denial of this by Klein, and it shews that in January, four or five weeks at least before the writ would expire, Klein knew that it had not been served; and there was, therefore, ample time, before it did expire, to serve the writ or to have it properly renewed. There was never any difficulty in serving it upon the respondent, at its place of business, either in Simcoe or in Hamilton.

Upon this state of facts, no case was made for allowing the writ to be renewed, even if, had a case been made, it was in accordance with the practice of the Court to permit a renewal so as to revive a cause of action which had become barred. There is no explanation of the reason for failing to serve the writ while it was yet in force; and, with the knowledge that Klein had in January that it had not been served, there was no reason why it was not served before it had expired, or why an order was not obtained while it was yet alive for its renewal. If there was any difficulty in obtaining possession of the writ, a duplicate writ might have been issued (Rule 8) and a copy of it served before it had expired, or, if it was desired to renew it, leave to serve less than two days' notice of the application for leave to renew might have been obtained from a Local Judge in Hamilton, and the application have been made before the writ had expired. In addition to all this, there is no satisfactory explanation of the delay of upwards of four months between the 3rd March, when Mr. Counsell was instructed, and the making of the application to the acting Master in Chambers.

In my opinion, where, owing to the expiry of the writ of summons, a cause of action has become barred, leave to renew the writ *nunc pro tunc* ought not to be granted. Even where the writ is yet alive, the plaintiff may not, as he formerly might have done, take it to the proper office and have it renewed, but he must obtain leave to renew it, and apparently the only ground upon which such an application is based is that for a sufficient reason any defendant has not been served (Rule 9). The practice in England is well settled, and it is that leave to renew will not be granted if the cause of action has been barred by a statute of limitations.

It was so decided by Chief Justice Cockburn in *Doyle v. Kauf-*

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man, 3 Q.B.D. 7; and his judgment was affirmed by the Court of Appeal (3 Q.B.D. 340), which intimated its opinion that the principle of the decision of the Court below was right, but dismissed the application on the ground that the plaintiff himself had been guilty of such laches as disentitled him to a renewal of the writ.

That case was followed by the Court of Appeal in *Hewett v. Barr*, [1891] 1 Q.B. 98, and in delivering his judgment Lopes, L.J., said that in his experience the practice as laid down in *Doyle v. Kaufman* "had been followed ever since." Kay, L.J., while concurring in the judgment of the Court, was disposed to think that the Court had power under exceptional circumstances to grant such an application as that which was being dealt with, and said that he could "imagine a case where, it being proved that every kind of effort had been made to serve the writ, and by accident or mistake no application to extend the time having been made within the year, it would be very hard that the plaintiff should lose all remedy because the period of limitation had in the meantime expired."

In *Smalpage v. Tonge* (1886), 17 Q.B.D. 644, *Doyle v. Kaufman* was distinguished, on the ground that in it the right of action had gone, while in the case under consideration it had not gone because the writ had been regularly renewed and was still in force, and all that the plaintiff was asking was for leave to issue a concurrent writ and to serve it out of the jurisdiction. No doubt was suggested as to the correctness of the decision in *Doyle v. Kaufman*, but on the contrary it was treated as a binding authority for what was decided in it.

The same practice has been followed in this Province. One of the cases in which it was followed is *Williams v. Harrison*, 6 O.L.R. 685, a decision of the Master in Chambers, affirmed by the now Chief Justice of the Common Pleas. I refer also to *Mair v. Cameron* (1899), 18 P.R. 484.

This case differs from *Doyle v. Kaufman* in that the common law cause of action is not barred; but that affords no reason for allowing that to be done which will revive the cause of action that is barred.

There is nothing to prevent the appellant from issuing a new writ and proceeding with an action based upon his common law claim, and that he should be left to do.

I would affirm the order and dismiss the appeal with costs.

[APPELLATE DIVISION.]

RÉAUME v. COTÉ.

Limitation of Actions—Possession of Land—Limitations Act, R.S.O. 1914, ch. 75—Declaration of Title—Judicature Act, sec. 16 (b)—Declaratory Judgment—Discretion.

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Though the Court has power under sec. 16 (b) of the Judicature Act, R.S.O. 1914, ch. 56 (as under the former Chancery General Order 538 and the English Order xxv., r. 5), to make binding declarations of right, whether any consequential relief is or could be claimed or not, the Court has, in all cases, a discretion to grant or withhold a mere declaration of right. In this case, that discretion was exercised adversely to the plaintiff claiming a declaration that she had a good title to land of which she was in possession—her alleged title being solely derived by length of possession for a period exceeding the ten years prescribed by the Limitations Act, now R.S.O. 1914, ch. 75.

Miller v. Robertson (1904), 35 S.C.R. 80, followed.

Foisy v. Lord (1911), 2 O.W.N. 1217, 3 O.W.N. 373, distinguished.

Judgment of SUTHERLAND, J., reversed.

ACTION for a declaration that the plaintiff was entitled to the fee simple in certain land as against the defendants.

The action was tried by SUTHERLAND, J., without a jury, at Sandwich.

J. Sale, for the plaintiff.

J. H. Rodd, for the defendants Aggie Côté and Jennie Réaume.

A. St. G. Ellis, for the defendant Dorothea Williams, an infant.

July 31, 1915. SUTHERLAND, J.:—The defendants, who are contesting the plaintiff's right to the declaration asked for, are Aggie Côté (formerly Réaume) and Jennie Réaume, daughters of Benjamin Réaume, deceased, and Dorothea Williams, the infant daughter of a deceased daughter of the said Benjamin Réaume.

There are four other defendants on the record, namely, Lorne B. Williams, Walter R. Williams, Mitchell W. Williams, and Labelle Cullen. The defendants Lorne B. Williams, Walter R. Williams, and Mitchell W. Williams, either before or since the writ was issued herein on the 4th November, 1914, by quit-claim deeds conveyed their interest in the property in question to the plaintiff. A brother of theirs, namely, Edwin C. Williams, had previously, in April, 1903, conveyed his interest therein to Josiah Réaume, the husband of the plaintiff.

It is said that the defendant Labelle Cullen has had the pleadings noted as against her, she not having filed any statement of defence.

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The action is for a declaration that the plaintiff was on the 17th day of September, 1914, entitled in fee simple to lot No. 1 on the north side of Church street, otherwise lot No. 1 on the south side of Main street, in the town of Sandwich, in the county of Essex, containing by admeasurement three-quarters of an acre.

In or about the year 1868, two brothers, named Benjamin Réaume and Josiah Réaume, were engaged in partnership as millers and merchants in the towns of Sandwich and Windsor. On the 3rd December, 1868, they obtained a deed of the said lot from Alexander Chewett, the patentee from the Crown, "together with the steam grist mill etc.," which were apparently then upon it.

At the time of this conveyance, both joined in a mortgage to Chewett to secure an unpaid balance of the purchase-money of \$1,300, and in 1873 this mortgage was discharged.

Benjamin Réaume died on the 1st December, 1873. There is evidence to the effect that the surviving partner made considerable repairs to the mill thereafter, but that in November, 1874, it was burned.

It would appear from a letter put in on behalf of the defendants and dated the 11th September, 1874, that, up to the time of the destruction of the mill, the widow of Benjamin Réaume had also been actively concerned in leasing it. There is no evidence, of any definite or reliable kind, as to the way in which the partnership between the two brothers, which was put an end to by the death of Benjamin, was thereafter wound up and the assets distributed between the surviving partner and the representatives of his deceased brother.

On behalf of the plaintiff there was produced at the trial a bundle of tax receipts covering most of the period from 1882 to 1913 inclusive. In the years 1882, 1886, 1887, 1889, and 1891, the tax demands and receipts appear to have been made out in the name of the Réaume estate. There is no explanation as to this, or whether it meant the Benjamin Réaume estate. The plaintiff testified that from the time the mill was burned the taxes were paid by her husband.

An earlier receipt was also put in on behalf of the plaintiff, dated the 13th September, 1882, signed by the then town treasurer, and reading this way: "Received from Mrs. Williams, for Mr.

Josiah Réaume, the sum of \$7.54 for taxes." This receipt was for the taxes for 1878. There is also a receipt, dated the 19th January, 1888, covering the taxes for 1886, in which payment is acknowledged from J. Réaume.

From 1893 to 1906, all the receipts and demands are in the name of Josiah Réaume, and from 1907 to 1913 in the name of Mary Réaume. On the 26th September, 1906, Josiah Réaume conveyed the lot in question, in consideration of "love and one dollar," to his wife, Mary Réaume, the plaintiff herein.

The only papers produced by the defendants were certain insurance policies upon the mill in the years 1869, 1871, and 1872, in the first of which the insurance seems to have been taken out in the name of Benjamin Réaume, and in the other two in the partnership name, and a receipt for the taxes for the years 1883 and 1884, when they seem to have been paid by a man named Israel Desjardin. There is nothing to shew on whose behalf Desjardin paid them. The plaintiff testified that her husband had possession of the lot from the time the mill was burned down to the time of his conveyance to her, and thereafter she had possession of it down to the time that the writ was issued, not an actual physical possession, as there is no building on the property, but through a tenant, who used it for pasture. No one lived on the property, and it was not cultivated. She made the general statement that the lot was fenced and rented since the burning of the mill. She also said that for 13 or 14 years before this action was commenced, and possibly longer, it was dealt with as follows:—

A man named William Parker wanted it for pasture, and she rented it to him for her husband; Parker was to keep the fences up and in repair and keep the weeds down. He says that he has had charge of the lot for some 16 or 17 years under this arrangement; that at first he dealt with C. H. Ashdown, representing the plaintiff's husband or herself; and that—Ashdown having died in 1903—he thereafter dealt with the plaintiff herself. It appears that for some years before his death the plaintiff's husband had been ill, and she transacted his business for him. Parker says that he had the use of the lot and did use it for pasture for years for his cows and horse, and that the arrangement made between Mrs. Réaume and himself has not ceased yet. He agrees that he

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was to keep the fences in repair and keep the weeds down. He says that the fence was a wire fence of about five strands; that sometimes it would go down in the winter, but he would repair it again in the spring; and that he has thus substantially kept up the fence all the time. He also says that the lot has never been cultivated.

Both the plaintiff and Parker say that during all these years they never heard of any objection to their title or possession on the part of any one. It appears that in the year 1902 an advertising and bill-posting agent, named Brown, applied to Parker for leave to put an advertising sign on the lot in question, and was given the right to do so, the fee charged being for the first three years \$5 a year. The sign is a very large one, being 85 feet in length and upwards of 10 feet in height. The \$5 paid by Brown to Parker was handed over by him to Mrs Réaume, who ratified the lease or license to Brown. The rental for this sign-board was increased later to \$10 a year, and later to \$15, and finally for the last two years to \$20, and the rental was paid to the plaintiff. One year the sign blew down, but was put up again.

The defendant Aggie Coté testified that her uncle, Josiah Réaume, came to her about 20 years ago and spoke of having paid certain taxes on the lot, and that her mother had never paid any taxes thereon. He also spoke of certain bills he had against her father, and asked her to sign off her share in the lot. She says that she asked him what proof he could give to her that he had paid the bills. He thereupon said that he did not want the payment of the taxes or the money, but wanted her signature, which she refused to give.

It appears that, before this action was commenced, the Corporation of the Town of Sandwich made an offer to the plaintiff for a part of the lot in question; but, on the title being searched, raised some question as to her ability to give a good title. The plaintiff thereupon saw the defendant Aggie Coté and spoke to her about the proposed purchase by the town corporation. She intimated to her that she had only herself and her sister, the defendant Jennie Réaume, to deal with, whereupon, Aggie Coté says, she told her that she should get something for her interest. She says that the plaintiff wished her to use her influence with Jennie Réaume to induce her to convey any interest she had also.

The plaintiff, however, would not agree to pay anything to Mrs. Coté, and stated to her that she had nothing to shew that she had any interest in the property.

The plaintiff, who is asserting a title by possession, is not a trespasser. She undoubtedly is entitled, through her husband, to an undivided one-half interest in the property, and in addition has acquired the interest of certain of the heirs of Benjamin Réaume. She is invoking the statute against other heirs claiming to be interested in the land, but who, undoubtedly, for a much longer period than that necessary to constitute a statutory bar, have in no active way asserted any claim or title or done any act to preserve any.

It is equally clear that Josiah Réaume, during his lifetime, and his widow after his death and up to the time of the commencement of this action, were asserting and claiming the ownership thereof by paying the taxes and by leasing the property to the tenant Parker. It is also plain that during all these years a reasonably substantial fence was kept and maintained in such a way as to keep the lot continuously enclosed, with the exception of the occasional times in the winter when, by reason of the elements, it would be knocked or thrown down. The granting to Brown the right of placing the bill-board on the property and the receiving of rent therefor was also an act in the way of assertion of ownership, and the bill-board was itself a notice to the world that some one was assuming to deal with the property, and sufficient to put those interested upon inquiry.

While in some cases the payment of taxes and the maintenance of a fence are not considered conclusive evidence of possession, it seems to me that, under the circumstances already adverted to, they are very important considerations. Reference to *Campeau v. May* (1911), 2 O.W.N. 1420; *Piper v. Stevenson* (1913), 28 O.L.R. 379.

I think, upon the facts disclosed in evidence, it is clear that the plaintiff, by her husband and herself, has been in visible, open, continuous, and exclusive possession, through themselves or their tenant, of the lot in question for more than the statutory period necessary to extinguish any title of the defendants.

The land was acquired originally by the brothers as copartners, joint tenants, or tenants in common. When, after the death of

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Benjamin Réaume and the burning of the mill, his brother Josiah commenced to pay the taxes on the property, and later on to assert the right to take possession and lease it to Parker and to Brown, that possession became adverse to the claim of the heirs of Benjamin; and, even though Josiah had been such a copartner, joint tenant, or tenant in common with his brother, his possession and his receipt of the rent would not enure to their benefit: Limitations Act, R.S.O. 1914, ch. 75, sec. 12; *Harris v. Mudie* (1882), 7 A.R. 414; Dart on Vendors and Purchasers, 7th ed., p. 451.

The plaintiff will, therefore, have a declaration in her favour that she has been in possession of the land for a long enough period to extinguish any title of the heirs of the Benjamin Réaume estate therein.

The plaintiff was obliged to come into Court to ask for a declaration; the costs have not been materially increased by the defendants; and therefore I am disposed to think that, under all the circumstances, the order I should make as to costs is that there be no costs to any party to the litigation.

The defendants Aggie Coté and Jennie Réaume appealed from the judgment of SUTHERLAND, J.

November 26, 1915. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ. A.

J. H. Rodd, for the appellants, argued that the Court should not grant a declaratory judgment such as asked here. This was clearly shewn by the decision in *Miller v. Robertson* (1904), 35 S.C.R. 80. He also contended that the evidence had not established possession by the plaintiff for more than the statutory period necessary to extinguish the title of the defendants: *Soper v. City of Windsor* (1914), 32 O.L.R. 352; *Piper v. Stevenson*, 28 O.L.R. 379; *Stovel v. Gregory* (1894), 21 A.R. 137; *Campeau v. May*, 2 O.W.N. 1420; *Coffin v. North American Land Co.* (1891), 21 O.R. 80.

J. Sale, for the plaintiff, respondent, contended that there was ample jurisdiction in the Court to grant the declaratory judgment, and referred to clause (b) of sec. 16 of the Judicature Act, R.S.O. 1914, ch. 56, and to the case of *Foisy v. Lord* (1911), 2 O.W.N. 1217, 3 O.W.N. 373, in support of his contention. He

contended also that the conclusion of the Court below that the plaintiff had proved the necessary possession was borne out by the evidence.

Rodd, in reply.

January 10, 1916. The judgment of the Court was delivered by GARROW, J. A.:—Appeal by the defendants from the judgment of Sutherland, J., who found in favour of the plaintiff, at the trial before him without a jury.

The plaintiff is in possession of the land in question, and the action was brought to obtain a declaration that she is entitled in fee simple as against the defendants. The plaintiff's alleged title as against them is solely derived by length of possession for a period exceeding the ten years prescribed by the Statute of Limitations; and the relief which has been granted is simply a declaration that she is so entitled.

Sutherland, J., was of the opinion that the fact of possession for more than the statutory period had been established by the evidence: a conclusion upon which, for reasons which follow, I express no opinion.

A question was raised before us, apparently for the first time, as to the propriety of granting a declaratory judgment under the circumstances.

This question, besides being of general importance, is, in view of the numerous authorities on the subject, both in our Courts and in England, one of some nicety.

Relief by means of a declaratory order or judgment is borrowed from the old Chancery practice. There was no similar practice in the Courts of Common Law. Our Chancery General Order 538, which for many years prescribed the practice, said: "No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby; and the Court may make a binding declaration of right without granting consequential relief."

Clause (b) of sec. 16 of the present Judicature Act (R.S.O. 1914, ch. 56) provides that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

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This statutory provision was first introduced by the Administration of Justice Act, 1885, 48 Vict. ch. 13, sec. 5, and is identical in language with the English Order XXV., r. 5.

In *Bunnell v. Gordon* (1890), 20 O.R. 281, Ferguson, J., expressed the opinion that the difference between the law under the provisions of Order 538 and under the statute was, that the former enabled the Court to make a binding declaration when consequential relief was or might have been claimed, and the latter to do so whether consequential relief is or is not claimed. And that the effect of the statute was not to make a radical change in the rules and practice of the Court, but only to empower the Court in a proper case to make the declaration, even though consequential relief could not be claimed. In that case relief was asked by way of a declaratory judgment in respect of an inchoate right of dower, and was refused.

In an earlier case, *Austen v. Collins* (1886), 54 L.T. R. 903, 905, cited by Ferguson, J., in his judgment, Chitty, J., had expressed a similar opinion upon the effect of the English Order XXV., r. 5, which, as I have before pointed out, is identical in terms with our statute. At p. 905 that learned Judge also said: "The rule leaves it to the discretion of the Court to pronounce a declaratory judgment when necessary; but it is a power which must be exercised with great care and jealousy."

Similar relief was refused by a Divisional Court in *Stewart v. Guibord* (1903), 6 O.L.R. 262, in which the declaration was sought to enable the plaintiff to collect from the Government a money demand which was also claimed by the defendant. It may not be amiss, however, to point out that the cases to which Street, J., in delivering the judgment of the Court, refers, stand upon a somewhat distinct ground of their own, namely, the impropriety of the Court interfering by a declaratory judgment in a matter for the determination of which another tribunal has been provided. See also upon this branch the remarks of Meredith, C.J.O., in *Ottawa Young Men's Christian Association v. City of Ottawa* (1913), 29 O.L.R. 574, at p. 581.

But the case of *Miller v. Robertson*, 35 S.C.R. 80—the headnote of which says, "A Court of Equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations nor restrain by injunction a person from

selling land of another"—seems to be almost precisely in point, and is of course an authority which we should follow even if we doubted its reasoning; which I do not.

In that case, as in this, the plaintiff's title rested entirely upon his possession. The plaintiff's action was for an injunction to restrain a threatened sale by the defendant, the owner of the paper title, and a declaration that the plaintiff was entitled. The Judge in Equity had made a decree declaring the plaintiff to be the owner in fee of the land. This was reversed by the Supreme Court, and the action dismissed. The case, it is true, came from New Brunswick; but it is evident from the course of the argument, and also from the judgment itself, that the decision did not proceed to any extent upon any peculiarity in the law of that Province. In that case, as in this, the objection which prevailed had not been taken in the Courts below; but, notwithstanding, full effect was given to it, although the defendant was quite properly deprived of his costs.

There can be no doubt, therefore, upon all the authorities—to only a few of which I have referred—that now in all cases a discretion exists in the Court to grant or to withhold a mere declaration of right. That being so, a very proper case for the exercise of the discretion adversely to the plaintiff seems to be such a case as this.

Upon the argument we were referred to the case of *Foisy v. Lord*, 2 O.W.N. 1217, affirmed in 3 O.W.N. 373, in which a similar judgment was pronounced; but the point was apparently not raised in that case any more than in this. Moreover, the facts considerably differed from those now before us. The action was brought to rectify a deed, and rectification was also asked by the defendant. In the end the claims on both sides for rectification were disallowed, and a declaration made that the defendant (not the plaintiff) had acquired a title under the statute, by possession. The judgment in the Divisional Court is contained in two lines, thus: "The Court, Falconbridge, C.J.K.B., Britton and Latchford, JJ., dismissed the appeal with costs."

Under these circumstances, that case is not, I think, an authority of value for the plaintiff in this case.

For these reasons, I think the appeal should be allowed, but, under the circumstances, without costs, and the action should be dismissed, also without costs.

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[APPELLATE DIVISION.]

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Infant—Custody—Separation of Parents—Right of Father to Custody of Girl of Ten Years—Welfare of Infant—Conduct of Parents—Infants Act, R.S.O. 1914, ch. 153, sec. 2 (1).

The provision of the Infants Act with regard to the custody of infants, now found in R.S.O. 1914, ch. 153, sec. 2 (1), originally 50 Vict. ch. 21, sec. 1 (1), is not, in so far as it expresses concern for the welfare of the infant, intended to exalt the interest of the infant into one of paramount importance. Other things, such as the conduct of the parents, being equal, when it happens that the wishes of the parents conflict, the Court must determine which is to have the custody, having regard, however, to the father's practically immemorial right to control, unless he has forfeited that right by misconduct.

Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of the child merely because the wife prefers to live away from him.

Re Mathieu (1898), 29 O.R. 546, approved.

The order of LENNOX, J., in Chambers, awarding the custody of a girl of ten to the father, where the mother chose, without valid reason, to live apart from him, was affirmed by the appellate Court (MACLAREN, J.A., dissenting).

APPLICATION by James Frederick Scarth, the father of a girl of ten years, for an order for her custody.

October 19, 1915. The application was heard by LENNOX, J., in Chambers.

R. C. H. Cassels, for the applicant.

Henry Howitt, for the respondent, Amy H. R. Scarth, the wife of the applicant and mother of the child.

November 4, 1915. LENNOX, J.:—James Frederick Scarth, manager of the Imperial Bank of Port Arthur, at a salary of \$3,000 a year, applies for the custody of his daughter, Mary Howitt Scarth, a girl of about ten years of age. Mrs. Scarth resides with her parents, Dr. and Mrs. Howitt, at 58 Maple avenue, Toronto, and the infant, for the time being, has her home there.

I need not closely scrutinise what is set out in Mrs. Scarth's affidavit referring to her married life prior to Christmas, 1913. There were, no doubt, faults and failures on both sides, and disappointments too; it is the common lot, married or single—"into each life some rain must fall;" but the examination of Mrs.

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Scarth, strikingly in abatement of the statements in her affidavit, and her father's letter to Mr. Scarth of the 12th July, 1913, conclusively shew that there was no fundamental difficulty, and that the husband and wife were living together comfortably and fairly happily until the 1st July, 1913, when Mr. Scarth went to Port Arthur. Without assuming that Mrs. Scarth's affidavit is intentionally untrue, there are many statements in it that, in the light of her own examination, and the affidavits of her father and mother, I cannot accept. It is sufficient to refer to one out of many circumstances. I am compelled to conclude that it is not true that at any time—until she flatly refused to have anything to do with him—her husband refused or neglected to provide for her and her child according to their station in life and his resources. She is not corroborated in this statement by her parents, as she certainly would be if ground for the statement existed, for they would know, and they both made affidavits; and it is not the proper inference to be drawn from her own examination. On the contrary, I am satisfied that the husband not only fairly shared his income, but generously applied the bulk of it for the benefit of his wife and child.

But, even if this were in doubt, the potent fact is that this is not the cause of separation; and, in addition to this, it is to be kept in mind that they continued to live together, and faults, if they existed, were overlooked—if not forgiven—and condoned. The wife's remaining in Toronto was agreed to by the husband out of consideration for her, and they parted upon mutually friendly terms, and upon the unqualified agreement that Mrs. Scarth would take up housekeeping with her husband in Port Arthur in the spring of 1914. When Mr. Scarth left for Port Arthur, he made ample provision for her; delivering to her a book of signed cheques to be filled up and drawn upon his bank account from time to time as she required money. This is the starting-point.

What has happened since then? In the absence of her husband and without consulting him, Mrs. Scarth conveyed her property to her father, with whom she was living, for a consideration which both father and daughter refused and refuse to disclose.

Mrs. Scarth had a legal right to make the conveyance, and Dr. Howitt had, perhaps, a legal right to accept it; but the pro-

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priety or wisdom of Dr. Howitt's action, seeing that his greatest anxiety, taking what he says, has always been to promote friendly relations between his daughter and son-in-law, who were then getting on very well, is not clear to me. The father and daughter had the *legal* right, and their action gave no right to the husband to separate from or repudiate his wife; and he has never desired or claimed it; but it surely gave him the limited right or justification—the poor consolation—of being angry or “very indignant and demonstrative” when he found out what had been done; and it gave him ample justification, in my judgment, to revise his opinion as to the wisdom of leaving his wife longer in her father's house. This is the whole of it; there is no pretence that the husband attempted to assault his wife or made a threat of any kind. Perhaps he should not have been so angry, perhaps it was weak of him to sob over the disappointment of it all—coming home for a happy Christmas after months of enforced absence—but at all events I am not prepared unsparingly to condemn the husband for resenting what had been done, and saying so, or for determining to take his wife back with him to Port Arthur; and I am certainly not prepared to say that Mrs. Scarth can now, in consequence, capitalise all the petty annoyances of her married life—until then forgiven, and seemingly forgotten—and, adding these to her husband's “indignation,” make of them a total of wrong or misconduct sufficient to justify her in deserting her husband and denying him the custody of their child.

I am perhaps stating her objections too broadly. It is only now, when he seeks to regain his child, that the full measure of his offences is made out. The position that Mrs. Scarth took in January, 1914, as I recollect it, was simply that she so resented the temper her husband shewed at this time, and the evidence it afforded that he only married her for her money, that she thereupon determined for these causes never to live with him again, and said so. A number of faults and failings, the ordinary growth of litigation, have been resurrected since then, but even now, upon her examination, she comes back again and again to the statement that her outstanding justification is his anger on that occasion and what it revealed, and his “want of consideration” generally while they lived together.

In my opinion, this is not a sufficient cause for deserting her

husband. Impairment of her health through his conduct, or a well-grounded fear of physical injury, would indeed be matter for serious consideration; but there was no pretence of such a ground when Mrs. Scarth took her determination to separate, nor is it the meaning of her examination taken as a whole. On the other hand, Dr. Howitt makes the most of the danger to her health as a ground of defence. This argument would have greater cogency if an independent medical man had been consulted and had pledged his professional reputation for its validity. But how can I accept Dr. Howitt as being quite candid or unbiassed, when, knowing of his daughter's alleged unhappiness, her recurring illness, its serious character, and its alleged cause; knowing of the husband's annoyance about the property, his conviction that he was being undermined, and his determination to take his wife where these influences could not be at work; knowing that the husband's steady advancement was dependent upon cheerful compliance with the plans and policy of his employers; knowing all that he knows now, and all that he alleges now as cause for separation—he determines that the husband and wife are to live together again, and to this end—after consultation with the wife but without the knowledge of the husband—sets to work to bargain with the bank authorities, as to the husband's position as their employee, thwarts all the husband's plans, and determines behind his back where his home shall be and the atmosphere that shall surround it? And, further, granting that he desires to be honest, how can I believe the doctor to be an unprejudiced witness *now* and able to give a faithful and trustworthy picture of conditions prior to July, 1913, when I read again his letter to Mr. Scarth of the 12th July of that year? In it he says:—

“My dear Jim: We were relieved on receiving word that you had reached the end of your long journey in safety. For a few days after you left, poor Amy seemed exceedingly upset, but you will be glad to learn that since then she has been decidedly better. May appears to be keeping quite well. Dear child! she seemed to miss you very much at first. *It is a great trial for you all (the wife, the husband, and the child) to be suddenly separated in this way.*”

These are hardly the expressions I would look for from the father-in-law of a domestic tyrant to the tyrant, and they hardly

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conjure up a picture of glaring domestic infelicity. What am I to understand by it? If conditions were then as represented now, what did Dr. Howitt mean in January, 1914, when he endeavoured to make arrangements with the bank authorities? Was he so wholly untutored as to the sources of domestic trouble as to believe that a domestic fiend would suddenly be transformed into a good husband by having his affairs ordered, and his plans secretly frustrated, by an intermeddling father-in-law, and being forced to leave his wife subject to influences which, rightly or wrongly, he was so distinctly and "violently" resenting at that very time? Or was it that Dr. Howitt really had none of those haunting fears at that time, and would have no fears now but for the exigencies of this litigation—subtle and unconscious influences I am ready to believe, but sufficient to becloud his professional judgment and argue him into believing what he now wants to believe? Expert evidence, uncertain and hazardous at all times, is surely doubly inconclusive when the witness, by reason of paternity and affection, is, of necessity, not indifferent between the parties. I cannot accept it as established that Mrs. Scarth's health would be endangered or impaired by taking up her home with her husband, or that it is necessary or advisable that Dr. Howitt should always be at hand for consultation, assistance, and advice, professionally or otherwise.

On the contrary—although no doubt it was well meant—I am of the opinion that there might be none of this trouble if the father and mother had not been so constantly projected into the life of their *married* daughter—their only daughter—if the parents had realised that there is no greater menace to the happiness of two young people beginning their married life than a temptingly convenient and injudiciously sympathetic parental court of appeal, always in session. It is the old story, and the old mistake, with the usual result.

Left to themselves to work out the equation "for better for worse;" given time to realise that no one is perfect, that no two people, not intellectually bankrupt, can always see eye to eye, and that each must allow some leeway to the other; encouraged or compelled to look to and depend upon each other, and none other; left to adjust their own accounts, setting off—for it cannot be all from one side—disappointment against disappointment, error

against error and fault against fault, and offsetting it all in the discovery of ever-accumulating compensations, and there is then no discoverable cause for separation unless it is to be found in Mrs. Scarth's seeming inability to distinguish what is vital and fundamental from imperfections or frailties which, if they exist, are matters to be borne or patiently corrected, and a notable lack of any proper sense of proportion or the obligations of marriage; and I can see no reason why they might not now come together if Mrs. Scarth would only be a little bit reasonable, forget a few manifestly exaggerated grievances, and realise and admit that where her husband's lot is cast should be her home. This is the tragedy of it all, that the future of two people, of social standing and irreproachable moral character, is to be marred and their child robbed of the home she is entitled to—the home of her *father and mother*—without adequate cause.

I must deal with the situation as it is. Mr. Scarth is in a position, and willing and apparently anxious, to care and properly provide for his wife and daughter. Mrs. Scarth positively refuses to resume marital relations. At one time she intimated that upon execution of a separation deed she *would consider* the question of living in the same house as her husband, but not as his wife. This proposal Mr. Scarth very properly rejected. I am not clear as to whether this tentative proposal is still open, nor does it matter (except as it bears upon Dr. Howitt's theory of mental worry), as it could not in any case be for one moment entertained; it is immoral *per se*, contrary to the purpose for which the holy institution of marriage was ordained, and contrary to the interest and policy of the State.

The alleged causes are not the causes of separation. The main cause is the desire of Mrs. Scarth to be near her old home, and her determination to subordinate her husband's plans to this end. Wittingly or unwittingly, this purpose was, I fear, fostered by her father and mother.

It is not quite irrelevant to inquire what prompted the conveyance to her father. It was not greed upon his part. He is a man of good financial standing, and generous where his daughter is concerned. That he paid enough for the property I have no doubt at all. The transaction was carried through after much consultation and advice, arrangement and re-arrangement. Was

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it done with a view to separation? What was the consideration? Why should it be a secret? Was enough paid or settled upon the wife to make her independent of her husband?

Who should have the custody of the child? The husband is *primâ facie* entitled, but his rights should be subordinated to the consideration of what is best for the child. The husband makes no charges or complaints against his wife. He does say that at times she was inclined to be extravagant, but this is not by way of complaint, but in explanation of the fact that he was not always able to give her all the money she asked; and, indeed, a man who marries the only daughter of an indulgent and well-to-do father has no great ground for complaint or surprise if it turns out that his wife has expensive tastes.

On the other hand, Mrs. Scarth, if she is speaking candidly, has a very bad opinion of her husband in every way; and, whether her tendency to exaggerate minor matters into serious difficulties is constitutional or not, her unfavourable judgment is not likely to be modified during a separation. It is, in my opinion, an erroneous and unjust judgment, and without even a plausible foundation. Under such conditions, the judgment of the grandfather and grandmother will be equally unfavourable.

It is inevitable that the child, if left with her mother, will be affected by the atmosphere of her home, and will come to think badly of her father. This, if reasonably possible, is to be prevented, because it is undeserved and unjust, and would necessarily to some extent mar the girl's life. Balance, moderation, a sense of proportion, a capacity to see both sides of the question, good judgment, rationality, and the uncommon sense called "common sense," are important qualifications in the person who is to mould the life of a young girl.

I have read the affidavits of the applicant and of his wife, and her examination, many times, and they have assisted me in determining what I ought to do. I have come to the conclusion that the interests of the infant will be best served by committing her to the custody of her father; and there will be an order accordingly. Permission to the mother to see her daughter at intervals will have to be provided for. But, in view of the fact that there is in reality no excuse for Mrs. Scarth's separating from her husband, in view of his attitude, and in the hope that this calamity may

even now be averted, I shall be prepared to consider an application for suspension of the order for a reasonable time, if the application is made before the order is taken out.

Without reflecting at all upon the conduct of the applicant, but having regard to the fact that Mrs. Scarth has no means except what she has derived or may receive from her father, I think it right that the husband, notwithstanding the result, should pay his wife's costs.

Amy H. R. Scarth appealed from the order of LENNOX, J.

December 8 and 9, 1915. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., for the appellant, argued that the order of Lennox, J., was not justified, inasmuch as it was not in the best interest of the child, which, under the statute and the authorities, is the all-important thing to be considered.* The evidence shews that the separation which took place in December, 1913, was caused by the harsh and cruel conduct of the respondent, and the unnatural relations which as a consequence had grown up between the parties. The worry and distress suffered by the appellant had produced such serious physical results as made it necessary for her to live where she could have the benefit of her father's medical skill and of the care and attention of her parents. [GARROW, J.A., said that *primâ facie* it was in the best interest of the child to live with her father.] The Court will consider in each case what the best interest of the child is, and make its order accordingly. The appellant has at present the custody of the child, which is of tender years, and she should not be deprived of it without the strongest reasons. The conditions are very similar to those which existed in the case of *Lovell v. Lovell* (1906), 11 O.L.R. 547, turning upon what may be called a sort of mental cruelty exercised by the husband towards the wife. The Court below has erred in regarding the father's right as paramount; the later cases shew that the welfare of the child is the main point;

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* The Infants Act, R.S.O. 1914, ch. 153, sec. 2 (1): "The Supreme Court . . . may make such order as the Court sees fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father"

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and this Court has the same right as the Court below to take the whole case into its consideration, as on a rehearing, rather than as on a mere appeal. It is perfectly plain that at the present time it is in the interest of the little girl to remain with her mother, where a pleasant and comfortable home with the best surroundings and associations is provided for her. The father's character is unfortunate, and his conduct has been in many respects reprehensible, shewing a lack of proper instincts, and a continuous, angry ill-humour. The following cases were referred to: *Re Keys* (1908), 12 O.W.R. 160, 269; *Re Argles* (1907), 10 O.W.R. 801; *In re Murdoch* (1882), 9 P.R. 132; *Re Cameron* (1913), 10 D.L.R. 814, 4 O.W.N. 876; *Re Westacott Infants* (1914), 25 O.W.R. 845, 5 O.W.N. 924; *Re Evans* (1913), 15 D.L.R. 218, affirmed (1914) 16 D.L.R. 851; *Re Hart* (1912), 4 D.L.R. 293, 3 O.W.N. 1287; *Re Hutchinson* (1913), 28 O.L.R. 114; *In re Elderton* (1883), 25 Ch. D. 220; *In re Elliott* (1893), 32 L.R. Ir. 504; *Jones v. Hough* (1879), 5 Ex. D. 115, *per* Bramwell, L.J., at p. 122.

R. C. H. Cassels, for the respondent, argued that the judgment of Lennox, J., was right, and should be affirmed both on the facts and the law. The welfare of the child is, no doubt, a consideration of importance, but the Court has never held that it is in the child's interest to take it from the father's custody, except for strong reasons, such as are not disclosed here. He referred to the judgment of Street, J., in *Re Mathieu* (1898), 29 O.R. 546, as being very much in point. The Court should not "lay down a rule which will encourage the separation of parents, who ought to live together, and jointly take care of their children." He also referred to *In re Agar-Ellis* (1878), 10 Ch. D. 49, *per* James, L. J., at p. 71; *Re Young* (1898), 29 O.R. 665; *Karch v. Karch* (1912), 22 O.W.R. 534, 3 O.W.N. 1446; *Re Faulds* (1906), 12 O.L.R. 245, 251, where *Re Mathieu* is approved.

Watson, in reply.

January 10, 1916. GARROW, J.A.:—Appeal by Amy H. R. Scarth, wife of James F. Scarth, the petitioner, and mother of the infant, from an order of Lennox, J., committing the care and custody of the infant to the father.

The father and mother were married in April, 1904, at the city of Toronto. The infant Mary Howitt Scarth, their only child, was born there on the 9th August, 1906.

At the time of the marriage, the father was an accountant in the Imperial Bank, on a salary of \$1,300 per annum. The mother was the only daughter of William Henry Howitt, a physician practising in the city of Toronto.

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After the marriage, the father and mother continued to reside together in the city of Toronto until the beginning of July, 1913, when the father was promoted to the position of manager at the town of Port Arthur. When the father left Toronto to assume his new duties, it was agreed between them that the mother should temporarily remain in Toronto with the child. The father returned to Toronto the following Christmas on a visit, and while on the visit, which began by being entirely friendly, there were disagreements, culminating in a demand by the father that the mother should at once come with him to Port Arthur, and a refusal by the mother to do so: a refusal which she has since maintained, although the father has repeatedly expressed his desire and willingness to receive and properly provide for her there.

The mother has, since a letter written by her to the father in January, 1914, declined to see her husband or to receive written communications from him, which have been returned unopened. The letter referred to above is as follows:—

“Maple Av., Jan. 22nd, 1914. My dear Jim: About the house at Port Arthur, I have thought it over and feel it is quite impossible for me to go up there at present. Your conduct and cruelty during the Christmas holidays have made a great difference to me and in my feelings towards you. I do not know if I shall ever forget about it, and it is impossible for me to think of going to live with you at present. I must ask you not to write to me about Port Arthur, as it upsets me, and I have not yet nearly recovered from your recent treatment. If you keep on writing on this subject, I shall have to return your letters unopened.”

And from that time forward she declined all correspondence with him or to see him personally when he came to the city.

The quarrel at Christmas was all concerning the mother's dealings, in the father's absence, with the house which, with the aid of her father, they had built in Toronto. The father of Mrs. Scarth gave the lot, costing \$3,000, to his daughter; \$5,000 was borrowed by Mr. Scarth on a mortgage, his wife joining, and a

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policy of insurance on the life of the father; and the mother's father agreed to advance a further sum of \$2,000 towards building. The father of the infant also expended of his own money considerable sums, which he estimates at over \$1,000; and in the end the house was built and afterwards occupied by them until he left for Port Arthur.

An agreement was also executed by the husband and wife and her father, whereby the property was transferred to Dr. Howitt, upon certain trusts therein stated, and whereby the father of the infant covenanted to pay taxes, water rates, and local improvement taxes upon the land, to pay the premiums of fire insurance upon the house, to keep the house in repair, to make payable to or cause to be made payable to the mother the life insurance policy, to pay the premiums thereon, and to pay to the mother \$25 a month for her personal use, but such payment was not to prejudice her right to full maintenance. And it was also agreed that Dr. Howitt might, upon the written request of his daughter, sell the lands, and in the event of selling he was to receive out of the proceeds the \$2,000 he had advanced, and should hold the balance of the proceeds upon the like trusts.

During the absence of the father of the infant at Port Arthur, the mother, without consulting her husband and entirely without his knowledge or consent, sold the house to her father. On the husband's return he was informed of the sale, but the parties, both father and daughter, absolutely declined to give him any particulars of the so-called sale; the daughter informing him in effect that it was none of his business, that the house belonged to her and she could do with it what she pleased. At which the husband, it is said, became very angry, and gesticulated and used loud and even violent language, which was by no means assuaged by the wife's retort which she admits to have made, and which her father in his affidavit also states: "I often feared it was money you were after; now I am sure of it"—surely a strange sort of oil to pour upon the troubled waters. The husband thereupon demanded that the wife should return with him to Port Arthur at once, although before the explosion he had apparently been quite willing to leave her with her father and mother for a further period.

In his review of the facts, Lennox, J., expressed the opinion that all the so-called instances of misconduct on the part of the

father prior to the quarrel at Christmas should be ignored as trivial and unimportant. He also expressed the opinion that the father's violence of gesture and language at that time—for that, after all, is all it amounted to—were, under the circumstances, natural and justifiable.

I agree with the views and conclusions of the learned Judge both upon the facts and the law.

The facts resemble those before a Divisional Court in *Re Mathieu*, 29 O.R. 546, except that here the child is considerably older. At p. 549 Street, J.—a very wise and careful Judge—says: “Where a husband has done no wrong and is able and willing to support his wife and child, this Court will not take away from him the custody of his child merely because the wife prefers to live away from him and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. There is no reason here, apart from the mere caprice of the wife, why the child should not have the advantage of living with both her father and mother: to do so would be far better for her than to live with either the father or mother alone, and it must be the aim of the Court not to lay down a rule which will encourage the separation of parents, who ought to live together and jointly take care of their children.”

I do not quote further: but the whole judgment is singularly applicable to the situation in this matter.

The Infants Act, now R.S.O. 1914, ch. 153, sec. 2 (1), originally 50 Vict. ch. 21, sec. 1 (1), was not, in so far as it expresses concern for the welfare of the infant, intended to exalt the interest of the infant into one of paramount importance, as contended by the learned counsel for the mother, nor was it even the introduction of a new principle, but rather the adoption by the Legislature of a rule which had been long acted upon by the old Court of Chancery. See *Andrews v. Salt* (1873), L.R. 8 Ch. 622, 640. The exact language is, “having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father.” Other things, such as the conduct of the parents, being equal, when it happens that the wishes of the parents conflict, the Court must determine, having regard however to the father's practically immemorial right to control, unless he has forfeited that right by misconduct. Here no misconduct has been

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established against the father. It is not even suggested that he is a man of bad habits; he is not charged with having at any time committed physical violence; nor is it said that he is not fond of the child. The worst that is said is that he is not responsive enough, that he is cold, lacking in affection; on an occasion he actually preferred to dine with his own relation when in New York with his wife rather than break the engagement at the instance of his wife and dine with hers. He has been, it is said, parsimonious, but a bank clerk on \$1,300 a year, or even on twice that sum, with a house in Toronto and a wife and a child to keep, must go carefully. He is evidently a man of ability, trusted by his employers, and likely, with a fair chance, to advance still further. He has already in ten years advanced from the position of an accountant to that of a manager at an important commercial centre, and from a salary of \$1,300 to one of \$3,000.

From all the evidence before us, and there is, at least in the bulk of the numerous affidavits and depositions filed, enough and to spare, it is to me very apparent that there is no sufficient reason for this husband and wife continuing to reside apart. The husband does not desire it, and there is no reason in his conduct towards his wife to justify it; I would even infer from the tone of the letter which I have before set out that the wife at that time had not given up all intention of resuming her place at her husband's side, and the activity of Dr. Howitt, even after the Christmas quarrel, undertaken with the concurrence, if not at the request of his daughter, to induce the head office to recall the infant's father to Toronto, points very strongly in the same direction. The mother, it is also said, suffers from occasional ill-health, and desires to remain near her father, who is also her physician; but, considering her duty as the petitioner's wife, she might at least make a trial of the change, which might even prove to be beneficial, especially if the trial is undertaken with a determination to make the best of things rather than the worst. Port Arthur is not yet of course Toronto, but I believe it is quite a civilised place, and even not without a plentiful supply of competent physicians.

I think the appeal must be dismissed, but without costs; and the order should not issue until the petitioner has satisfied the Court that he has made due provision to receive and properly care for the infant.

MAGEE and HODGINS, JJ. A., concurred.

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MACLAREN, J.A.:—After a careful reading of the papers in this matter, I find myself unable to agree with the order appealed from.

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I am of opinion that, in the circumstances disclosed in the affidavits in this case, an order should not have been made that Mrs. Scarth should “forthwith deliver the said infant into the custody of the said James Frederick Scarth,” the father. It appears that he has no home to take her to, and until that is provided I do not think a tender, delicate girl of ten years of age should be thus dealt with. Our statute, R.S.O. 1914, ch. 153, sec. 2 (1), provides that in deciding as to the custody of an infant regard should be had (1) to the welfare of the infant, and (2) to the conduct of the parents. In this case it appears to me that sufficient regard was not had to what the statute has placed in the foreground as being of prime importance.

I do not think that any useful purpose would be served by going in detail into the criminations and recriminations that have been put forward; but, taking into consideration all the facts, I have come to the conclusion that it is not in the interest of the child that she should be now removed from the care of her mother, where she is being confessedly well-cared for, but that she should be allowed to remain there in the meantime, subject to proper arrangements providing for the father having ample opportunities of seeing her and possibly having her with him from time to time, as may be arranged.

Appeal dismissed; MACLAREN, J.A., dissenting.

[APPELLATE DIVISION.]

MILK FARM PRODUCTS AND SUPPLY CO. LIMITED v. BUIST.

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June 8.
1916
Jan. 10.

Contract—Sale of Land and Business—Mistake—Rescission—Return of Money Paid—Restoration of Property—Executed or Executory Contract—Failure of Consideration—Impossibility of Performance—Municipal By-law—Invalidity—Power to Suspend Operation in Individual Cases.

The plaintiffs, who contemplated entering extensively into the milk business in a certain city, agreed with the defendant, who was in the business in that city, to buy his land and premises, plant, and goodwill, and to

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employ him as manager. The intention was to enlarge the buildings and plant and to extend the existing business. At the time of making the agreement, a by-law was in force in the city which provided that a certain district, of which the defendant's land formed part, should be a residential area, and prohibited the erection in it of any factory. The existence of the by-law was not known to either the plaintiffs or the defendant when they made their agreement; and, when they learned of the difficulty which the by-law apparently created—preventing the enlargement of the buildings—they attempted to obviate it, but in the end without success; and the defendant—who had been in possession as manager for the plaintiffs—resumed possession as owner. The plaintiffs brought this action for rescission of the agreement and for the return of moneys paid to the defendant under it. The defendant did not ask that the agreement should be performed, but was content to accept a cancellation if the plaintiffs' claim for a refund should be disallowed. The city council was, by one of the clauses of the by-law, permitted to suspend its operation in individual cases:—

Held, by MIDDLETON, J., the trial Judge, that rescission could not be granted, because the plaintiffs were not in a position to restore the defendant to the position of things which existed before the agreement was entered into; that the agreement should be regarded as executed and not merely executory, because the plaintiffs had taken possession; and that there had not been a complete failure of consideration sufficient to justify rescission upon that ground.

The judgment of MIDDLETON, J., dismissing the action, was affirmed by a Divisional Court of the Appellate Division.

Held, per GARROW and MACLAREN, JJ.A., that, as both parties acquiesced in the conclusion that the by-law was valid and that it presented an insuperable obstacle to carrying out the original intention, it was immaterial to consider whether the by-law was or was not valid; there being no evidence that the price agreed upon was made in any way to depend upon the proposed additions and enlargements, it could not be said that there was a total or even a partial failure of consideration; there was no mistake, mutual or otherwise, about the parties, the subject-matter, or the consideration; relief could not be granted to a purchaser on the sole ground that he was disappointed in the use to which he might be able to put the purchased property—the seller being in no way responsible for the disappointment; and, even if it were assumed that there was a failure of consideration, the money paid upon the contract before the failure could not be recovered back.

Per MEREDITH, C.J.O., and HODGINS, J.A.:—The prohibition in the by-law existed at the date of the contract; and, if it rendered the purpose an impossible one on that date, the contract would be void *ab initio*, subject to whatever qualifications in the consequent rights of the parties might be found to subsist owing to its having been executed partly or in whole. But, according to *Re Nash and McCracken* (1873), 33 U.C.R. 181, the by-law was always bad on its face; the underlying purpose of the contract had never been rendered legally impossible; and the plaintiffs' mistake in imagining that the contract had always been impossible of performance was not a ground for relief.

ACTION for the rescission of an agreement of the 24th April, 1914, made between the plaintiffs and the defendant, for, among other things, the sale by the defendant to the plaintiffs of premises in the city of Hamilton, upon which the defendant was then carrying on a dairying business, and for the return of \$8,500 which had been paid on account of the purchase-money.

May 27, 1915. The action was tried by MIDDLETON, J., without a jury, at Hamilton.

S. F. Washington, K.C., and A. M. Lewis, for the plaintiffs.
Gideon Grant and D. Inglis Grant, for the defendant.

June 8, 1915. MIDDLETON, J.:—The plaintiff company originated in the laudable desire of a number of farmers near Hamilton to supply pure milk at a reasonable price to the inhabitants of that city. The venture was in its essence co-operative; the intention being to establish a first-class plant and to secure to the producers the maximum of profit by bringing them in direct touch with the consumers.

When it was sought to bring this proposition from the abstract to the concrete, the promoters of the undertaking sought Mr. Buist, who had been carrying on business in the city in the line contemplated. Negotiations took place looking to the purchase of his established business, and greatly enlarging the plant therein used, so as to take care of the milk output not only of the present members of the company, but of all those who were expected to join in the enterprise.

These negotiations culminated in an agreement of the 24th April, 1914. Buist agreed to sell his land, factory, and entire outfit, including his goodwill, at a price to be estimated at \$100 for every \$17 of net profit shewn by his books for the year 1913; receiving, in payment for this, two sums of \$5,000 on the 15th May and 15th June respectively—one-third of the price in stock of the company, and the balance in five years. This price would be about \$60,000. Buist was to become the manager of the company, and to receive \$3,600 a year salary.

Buist and his colleagues went abroad to investigate similar plants in other cities, and formulate their plans. Everything seemed to be going fairly well, when it was ascertained that the premises were within what had been declared by the Corporation of the City of Hamilton to be a residential district; and the city corporation, therefore, refused to permit the erection of the contemplated factory building.

The civic by-law, No. 1534, was passed on the 27th October, 1913. It excepts from its provisions the continued use of any

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building then erected, so long as it continues to be used for the same purpose, and it reserves to the council the right by by-law to grant permission for the erection and use of factory buildings within the district.

This by-law being found to be in existence, an application for leave under it was made, and the Board of Control made a report recommending the granting of the permission. This was adopted by the city council on the 9th June, 1914, but no by-law seems to have been passed.

In granting this permission, the city council acted on the assumption that a petition and assent of ratepayers lodged with them represented the real sentiment of the electorate. Unfortunately it did not; and, immediately on the passing of the resolution adopting the report, the electorate rose in its might and its wrath, and an exceedingly largely signed petition, with some hundred signatures, caused speedy action by the council, which, at its meeting of the 14th July, rescinded its former action.

Negotiations ensued, but without avail. Some members of the company bought, at very considerable expense, a lumberyard to the rear of the lot in question, and proposed laying out a new street through this, so as to give a frontage on what was then the rear of Buist's premises. This, it was thought, would be acceptable to the neighbourhood; but the scheme was rejected. The slow materialisation of the whole scheme checked stock subscription, and everything fell flat. Mr. Buist had been appointed to the position of general manager. He received, from the money coming from the stock subscriptions, \$8,500 on account of his purchase-price; he received other money that had to be paid for his stock on hand at the date of the agreement; and he received his \$300 per month until the funds were exhausted.

This action resulted on the 6th April, 1915. The plaintiffs seek to rescind the agreement and to recover back the \$8,500 paid, on the ground that the object and purpose of the contract was frustrated, the consideration for it failed, the scheme had become illegal by the municipal prohibition, and the parties had acted under mutual mistake as to the legality and possibility of what was undertaken.

The consideration of the case has given me much difficulty and anxiety, because I am convinced of the absolute good faith of both contracting parties; but I have come to the conclusion that the case is not one in which I can aid the plaintiffs. I do not think that they are in a position to make restitution so that the defendant may be placed in the same position as he occupied before the making of the agreement. The land can be reconveyed—there is no difficulty about that; but the sale was not merely a sale of land—it was a sale of the whole business undertaking as a going concern; and it appears to me that it is impossible, in June or even April, 1915, to give back to the defendant the business as it was in April, 1914. It is true that he has been general manager of the business in the meantime; but he was the general manager of the plaintiffs, and the plaintiffs are responsible for his acts as general manager. It is also true that the difference in value between the business now and the business then might be ascertained; but, as I understand the law, in order that there may be rescission there must be an ability to make restitution, and the defendant is entitled to receive back the thing he sold, and not something different, even plus compensation. Much of the change in the value of the business as a going concern may, no doubt, be attributed to the war and to the present financial stress everywhere prevalent; but this is a loss and change arising since the date of the contract, and it must in fairness be borne by the purchasers, and not by the vendor.

In *Attwood v. Small* (1838), 6 Cl. & F. 232, an action to rescind for fraud a contract with regard to collieries, iron works, and mines, Lord Cottenham, L.C., treated the fact that the property would necessarily vary from day to day as one calling for a stringent application of the rule as to restitution. The same principle is emphasised by the same Judge in *Vigers v. Pike* (1842), 8 Cl. & F. 562. In *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, Lindley, M.R., said, with reference to an action for rescission where there was no fraud, that there could be no rescission because the price of nitrate was liable to great fluctuation and the value of the property sold was not what it was, and it was, therefore, impossible to restore the parties to their former position (see p. 434).

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Lord Blackburn, in *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, speaking of a case of fraudulent misrepresentation, says: "Though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind." *A fortiori* when there is no fraud. If there be fraud, then the remedy is in an action for deceit; but where there is no fraud, but merely mistake, there is no recourse.

In all that I have said I have assumed in the plaintiffs' favour that this is not to be treated as an executed contract; but, although no conveyance has been made of the lands, possession has been taken, and in substance the contract is executed. If the contract is executed, and there is no fraud, the rule is that there cannot be rescission unless it is shewn "that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration:" *per* Blackburn, J., in *Kennedy v. Panama, etc., Mail Co.* (1867), L.R. 2 Q.B. 580, at p. 587; approved and followed in *Angel v. Jay*, [1911] 1 K.B. 666. The real meaning of this statement is further exemplified in *Cole v. Pope* (1898), 29 S.C.R. 291.

Here it cannot be suggested that there was a complete failure of consideration: the very business contracted for existed; the only thing that fell short was the ability of the purchaser to use the land for the purpose that both parties contemplated. It may well be that even an executory contract would not be rescinded for a mistake so entirely collateral to the bargain.

The action fails, but the vendor may well be left to share in the misfortune to the extent of paying his own costs.

The plaintiffs appealed from the judgment of MIDDLETON, J.

November 10, 1915. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

S. F. Washington, K.C., and *A. M. Lewis*, for the appellants, argued that they should be allowed to rescind and recover back

the \$8,500 paid under the agreement, because the object of the agreement had never materialised, the consideration had failed, the scheme had become illegal by reason of a municipal by-law forbidding the erection of a factory building upon the land purchased from the defendant, and the parties had acted under mutual mistake as to the legality and possibility of what was undertaken. On the question of impossibility of performance he cited *Addison v. Ottawa Auto and Taxi Co.* (1913), 30 O.L.R. 51, and *Clifford v. Watts* (1870), L.R. 5 C.P. 577.

D. Inglis Grant, for the defendant, respondent, said that he did not seek performance, but merely that the plaintiffs' claim be cancelled, and a refund denied. However, there was no impossibility of performance: *Civil Service Co-operative Society Limited v. General Steam Navigation Co.*, [1903] 2 K.B. 756; *Chandler v. Webster*, [1904] 1 K.B. 493. No refund should be allowed, because the plaintiffs could not place the defendant in the same position which he occupied before the agreement. In order to get rescission there must be the ability to make restitution: *Kearley v. Thomson* (1890), 24 Q.B.D. 742; Halsbury's Laws of England, vol. 21, pp. 8, 14, 15: *Bethune v. The King* (1912), 26 O.L.R. 117; *Stewart v. Kennedy* (1890), 15 App. Cas. 108, at pp. 117, 118; *In re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616; *Stapylton v. Scott* (1807), 13 Ves. 425; *Kilmer v. British Columbia Orchard Lands Limited*, [1913] A.C. 319. There had been no mistake on the part of either party.

Washington, in reply.

January 10, 1916. GARROW, J.A.:—Appeal by the plaintiffs from the judgment at the trial without a jury before Middleton, J., who dismissed the action.

The action was brought to obtain the rescission of an agreement dated the 24th April, 1914, made between the plaintiffs and the defendant, for, among other things, the sale by the defendant to the plaintiffs of certain premises on Emerald street south, in the city of Hamilton, upon which the defendant was then carrying on a dairy business, and a return of \$8,500 which had been paid upon account of the purchase-money.

The grounds upon which rescission is sought, as set out in

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the statement of claim, are: (1) that the agreement became impossible of performance; (2) that the object and purpose of the agreement were frustrated and the consideration for it failed; (3) that the agreement was and is illegal; and (4) that the parties to the agreement were mutually mistaken as to the existence of a certain by-law of the city which rendered their contemplated enterprise under the agreement illegal.

There seems to be little or no dispute about the facts. The plaintiffs, an incorporated company, contemplated entering extensively into the business of supplying milk and milk products at the city of Hamilton. The defendant had been successfully carrying on, upon the land in question, business of a somewhat similar nature, and it was deemed advisable to acquire not only his premises but his goodwill and his services as manager of the new business, all of which are provided for in the agreement. It was also intended considerably to enlarge the buildings and plant so used and occupied by the defendant, and considerably to extend and increase the then existing business. But, shortly after the agreement had been entered into, what appeared to the parties to be a serious obstacle, preventing the enlarging of the existing buildings upon the land, developed, in the shape of a city by-law passed on the 27th October, 1913, which had included the defendant's land in a residential area and prohibited the erection within it of any "factory," among other things. Efforts were made for a time by both sides to obviate the difficulty which appeared to be thus interposed, but in the end without success, with the result that the whole enterprise was apparently given up by the plaintiffs, and the defendant—who had been in possession as manager for the plaintiffs under the agreement—resumed possession as owner after notice to the plaintiffs that he intended to do so by reason of the plaintiffs' default in carrying out the agreement. Thereupon this action was brought.

The defendant does not ask that the agreement should be performed, but is apparently content to accept a cancellation if the plaintiffs' claim for a refund is disallowed.

Middleton, J., was of the opinion that rescission could not be granted, because the plaintiffs were not in a position to restore the defendant to the position of things which existed be-

fore the agreement was entered into. He also expressed the opinion that the agreement should be regarded as executed and not merely executory, because the plaintiffs had taken possession; and that it could not be said that there had been a complete failure of consideration sufficient to justify rescission upon that ground.

It is not, in my opinion, a material circumstance, as was urged before us, that a considerable portion of the purchase-money, now sought to be recovered, was paid after both parties were aware of the existence of the by-law. Both parties were, when the payments were being made, of the opinion, or at least indulging in the hope, that the difficulty created by the by-law would be overcome, and were looking forward to a full performance of the agreement. Nor is it, in my opinion, material to consider whether the by-law, which by one of its clauses permits the city council to suspend its operation in individual cases, was a valid by-law which the parties were bound to obey; a somewhat similar provision having been held fatal in *Re Nash and McCracken* (1873), 33 U.C.R. 181; for both parties acquiesced in the conclusion that it was a valid by-law and that it presented an insuperable obstacle to carrying out the original intention.

The plaintiffs' real difficulty, it seems to me, is that while disappointed in the enlarged use to which it was proposed to put the defendant's land, by extending and increasing the buildings and plant, they did get, or at least could have got, under the agreement, this very land, with the business and goodwill agreed to be purchased. Under such circumstances, it is, I think, quite out of the question to say that there was a total or even a partial failure of consideration; there being no evidence that the price agreed upon was made in any way to depend upon the proposed additions and enlargements.

The defendant is in no way shewn to be responsible for the plaintiffs' disappointment. He practised no deceit and made no false or erroneous representations for the purpose of bringing about the sale. Indeed, so far as appears, he was probably as much disappointed as the plaintiffs; for, in addition to the dis-

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turbance of his own affairs, he lost the management, at what seems a large salary, of the proposed new business.

Nor was there any mistake, mutual or otherwise, about the parties, the subject-matter, or the consideration—the usual grounds for relief upon the plea of mistake. I have not been able to find, nor did I expect to find, a single case in which relief had been granted to a purchaser because he was disappointed in the use to which he might be able to put the purchased property, unless some other ground intervened.

A somewhat similar question is discussed in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597. That case, it is true, arose upon a sale of goods, to which in some respects different principles apply, but it clearly determines that a wrong impression upon the part of a purchaser as to the quality of what he is buying (new oats instead of old) is harmless unless brought about by the vendor: a conclusion, it seems to me, quite as applicable to a sale of land as to a sale of goods.

Other cases, such as *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149, and *Scott v. Coulson*, [1903] 1 Ch. 453, before Kekewich, J., and, in appeal, [1903] 2 Ch. 249, acknowledge the correctness of the principle. In the former, at p. 164, Lord Cranworth puts the plaintiff's right to be relieved upon the ground of mistake in accepting a lease of his own property upon the ground that he had been honestly but mistakenly misled by the uncle of the lessor, under whom she claimed. And in *Smith v. Coulson* it appears, at p. 453 of the report in [1903] 1 Ch., in the statement of facts, that the defendant Coulson had received information which led to the belief that the person on whose life the policy of insurance respecting which the parties were contracting had been issued, was dead, and that he, Coulson, had, before the close of the negotiations, undertaken to communicate to the plaintiffs any information which he might receive as to the existence of the assured, but did not disclose the information he had received. See also *Tamplin v. James* (1880), 15 Ch. D. 215.

Even if it should be assumed, as the plaintiffs contend, that there was a failure of consideration, the plaintiffs' position would not, in my opinion, be improved. In what are called the "coronation" cases the principle applied in *Appleby v. Myers*

(1867), L.R. 2 C.P. 651, was approved, and it was laid down more than once that money which had been paid upon the contract before the failure could not be recovered back. See *Herne Bay Steamboat Co. v. Hutton*, [1903] 2 K.B. 683, in which the defendant unsuccessfully counterclaimed for a return of a deposit. There was a similar counterclaim in *Krell v. Henry*, in the same volume at p. 740, but it was not pressed. See also *Civil Service Co-operative Society v. General Steam Navigation Co.*, in the same volume at p. 756, an unsuccessful action to recover a payment made before the event.

In my opinion, the appeal fails and should be dismissed with costs.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—I agree in the result.

HODGINS, J.A.:—It was, no doubt, the purpose of both parties to erect a factory for the purpose of the proposed milk business on the lands purchased. That was the underlying idea which induced the appellants to do what they did. This element was common to both parties. The acquisition of the title, the employment of the respondent as manager, the inclusion in his salary of \$100 per month to superintend the construction of the new plant, and his acquiring stock in the company, were all done to put the appellants in a position to carry out their project, in which the respondent, as a stockholder, became largely interested. The respondent admits that going into the milk business was the primary object, and that, if a plant for pasteurising milk could not be put up, it would frustrate the main object of the agreement. He seeks to limit this view to the appellants, but, I think, unsuccessfully.

Pursuant to the contract, the appellants became the owners of the business of the respondent, and were, in legal contemplation, ready and willing to carry out the purpose they contemplated.

The prohibition in by-law number 1534 existed at the date of the contract; and, if it rendered the purpose an impossible one

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on that date, the contract would be void *ab initio*, subject to whatever qualifications in the consequent rights of the parties might be found to subsist owing to its having been executed partly or in whole: *Clark v. Lindsay* (1903), 88 L.T.R. 198; *Blakeley v. Muller & Co.*, [1903] 2 K.B. 760 (note); *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756, 764; *Chandler v. Webster*, [1904] 1 K.B. 493; *Elliott v. Crutchley*, [1904] 1 K.B. 565, [1906] A.C. 7.

In view, however, of the decision in *Re Nash and McCracken*, 33 U.C.R. 181, the by-law was always bad on its face. The underlying purpose of the contract, therefore, has never been rendered legally impossible. I do not see that mistake in appreciating the effect of the by-law makes any difference in this result. The appellants found their case upon the contract having been always impossible of performance. If that position cannot be maintained, their mistake in imagining that it could be, is not relevant, as it seems to me.

In the result, the appeal must be dismissed and the judgment affirmed. If the legal effect of the by-law was what the appellants assert, I am not prepared to say that their right, if under the circumstances they have any right, to recover back the money paid, could be completely met on the ground stated in the judgment in appeal, though it is not necessary to decide that question.

MEREDITH, C.J.O.:—I agree.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

REX v. MONSELL.

*Criminal Law—Undertaking to Tell Fortunes—Criminal Code, sec. 443—
Evidence—Deception—Intent to Defraud.*

To warrant a conviction for undertaking to tell fortunes, contrary to sec. 443 of the Criminal Code, an intent to delude and defraud on the part of the person charged must be shewn, but it is not necessary to shew that he has succeeded in deceiving or defrauding.
Rex v. Marcott (1901), 2 O.L.R. 105, explained.

CASE stated by the Senior Judge of the County Court of the County of York for the opinion of the Appellate Division of the Supreme Court of Ontario, as follows:—

"The accused was charged before me with having, in the month of August, 1915, undertaken to tell fortunes contrary to the Criminal Code. He elected to be tried before me without a jury, and was so tried on the 27th day of September, 1915, when I found him guilty of the offence as charged.

"Upon the application of counsel for the accused, I have reserved a case for the opinion of this honourable Court.

"I have made the notes of the evidence taken at the trial part of this case, and reserved for the opinion of this honourable Court the question:—

"Was I right, in view of the facts described at the trial, in making a conviction, notwithstanding the contention of the accused that the Crown witnesses were not deceived?"

[Three other cases were stated in the same or similar terms—*REX v. O'BRIEN* (two cases) and *REX v. KELLER*.]

January 10. The cases were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

T. C. Robinette, K.C., for the defendants, relied on *Rex v. Marcott* (1901), 2 O.L.R. 105 (also in 4 Can. Crim. Cas. 437), citing the head-note, which states that deception is an essential element of the offence of "undertaking to tell fortunes" under the section of the Code which is in question. Here the evidence shews that as a matter of fact no person was deceived. In the *O'Brien* cases, two girls went to the defendant with the express purpose of making evidence against the alleged fortune-teller. He also referred to *Rex v. Chilcott* (1902), 6 Can. Crim. Cas. 27, in which a document was signed by the complainant similar to one which was signed in the present case.

Edward Bayly, K.C., for the Crown, argued that the *Marcott* case did not cover the cases at bar, as here the Judge acted as a jury. The head-note does not accurately state the effect of the case. In these cases the trial Judge has found that the slip signed by some of the complainants was a mere subterfuge.

Robinette, in reply.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—These are cases

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stated by the Senior Judge of the County Court of the County of York.

The charges against the defendants are laid under sec. 443 of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found;" and the charges are, that the defendants had undertaken to tell fortunes.

The argument of the learned counsel for the defendants is, that it is essential in order to bring the cases within the section that the persons whose fortunes the accused had undertaken to tell must have been deceived; that the evidence shews that they were not deceived; and that a document was signed by them which in effect stated that they understood that what was being done was merely an examination of their palms according to rules laid down in certain books on palmistry, etc.

In support of his contention, the learned counsel referred to the decision of the Court of Appeal in *Rex v. Marcott*, 2 O.L.R. 105. That case does not, in our opinion, decide what it is cited for. As pointed out by Mr. Bayly, the question there was, whether there was any evidence to go to the jury, and it was held that there was such evidence. In delivering judgment, Chief Justice Armour said (p. 109): "Section 396 of the Criminal Code is a transcript of the enactment contained in the section above quoted. The word 'undertakes,' as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes, and in doing so is asserting the possession of a power which he does not possess, and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete."

So that, so far from supporting Mr. Robinette's contention, it is against him. There must be an intent on the part of the

person who is telling the fortune to delude and defraud, but it is not necessary that he should succeed in deceiving or defrauding.

But for that case I should have thought that the language of the section was plain and that it meant exactly what it says, that a man undertaking to tell fortunes—and that is what these defendants did—commits an offence within the meaning of the section. We are, however, bound by whatever was decided in that case.

Then as to the slip: it was found by the Judge that the use of it was a mere sham, and that it was not acted upon; but, if it had been a real thing, it would not, in the circumstances disclosed by the evidence, have helped the defendants.

Convictions affirmed.

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REX V. PORTER.

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Criminal Law—Fraud of Trader—Failure to Keep Books—Period of Time—Criminal Code, sec. 417 (c)—Fraudulent Intent.

It is an essential element of the offence described in sec. 417 (c) of the Criminal Code that the person charged shall not, for five years next before his inability to pay his creditors arose, have kept such books of account as are necessary to exhibit or explain his transactions, etc.; and, where the charge was that the person, being a trader and indebted to an amount exceeding \$1,000, and unable to pay his creditors in full, had not kept the necessary books, and it appeared that he had been in business for nine months only, a conviction based on sec. 417 (c) was quashed.

CASE stated by the Senior Judge of the County Court of the County of York for the opinion of the Appellate Division of the Supreme Court of Ontario, as follows:—

“The defendant was tried before me on the 3rd day of November last on the charge that he, being a trader and being indebted to an amount exceeding \$1,000 and unable to pay his creditors in full, did not keep such books of account in the said business as are required by section 417(c) of the Criminal Code of Canada.

“At the close of the Crown’s case, counsel for the defendant contended that sub-section (c) of section 417 of the Criminal

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Code of Canada, which reads as follows, 'being a trader and indebted to an amount exceeding \$1,000, is unable to pay his creditors in full and has not, for five years next before such inability, kept such books of account as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to account for his losses to the satisfaction of the Court or Judge and to shew that the absence of such books was not intended to defraud his creditors,' made it necessary for the defendant to have been in business for five years before his insolvency or inability to pay; otherwise there could be no case against the defendant; as he had been in business for a period of only a little more than nine months—the words of the statute being as above set out—he should now be acquitted.

"I found the accused 'guilty,' but have reserved for the opinion of the Court the questions following, and have made the evidence and exhibits at the trial, including the examination of the accused as an insolvent, part of this case:—

"(1) Must the defendant have been in the business in question for a period of five years next before his inability to pay, and does the being in business for a period of little more than nine months exempt him from the operation of sub-section (c) of section 417?

"(2) Should I have quashed the charge on the ground that no offence was shewn under the Criminal Code?"

January 10. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

T. C. Robinette, K.C., for the defendant, referred to sec. 417(c) of the Code, which, he said, was a new one, on the construction of which there was no decided case. The statute was intended to cover the case of a persistent course of action such as did not exist here. The omission of the term of five years in the charge is no mere formal defect, and should result in the quashing of the conviction. He referred to Archbold's Criminal Pleading, 24th ed., p. 71. [He was stopped.]

Edward Bayly, K.C., for the Crown, contended that the conviction was warranted, the defendant being unable to pay his

debts in full, and the failure to keep books having existed within the period of five years "next before such inability." He referred to the French version of the section, which, he thought, favoured a construction which would support the conviction.

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At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—Case stated by the Senior Judge of the County Court of the County of York.

This is a prosecution under sec. 417(c) of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to a fine of \$800 and to one year's imprisonment who . . . being a trader and indebted to an amount exceeding \$1,000, is unable to pay his creditors in full and has not, for five years next before such inability, kept such books of account as according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to explain his losses to the satisfaction of the Court or Judge and to shew that the absence of such books was not intended to defraud his creditors."

We think that it is plain that it is an essential element of the offence that the person charged, for five years next before his inability to pay his creditors arose, should not have kept such books of account as are necessary to exhibit or explain his transactions, etc. The charge in this case is simply that the person, being a trader and indebted to an amount exceeding \$1,000, and unable to pay his creditors in full, had not kept the necessary books.

This charge, in our opinion, disclosed no offence, as it omitted all reference to the time for which the failure to keep the books had continued.

If the contention of Mr. Bayly—which would require us to construe the section as meaning "at any time during five years"—were to prevail, a man who had carried on business for only a month, and during that time, or any part of it, had failed to keep books of account, would be, *prima facie*, guilty of the offence mentioned in the section.

What the section is aimed at is the failure to keep books of account with the fraudulent intent of defrauding creditors;

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and it was deemed proper that, where that has continued for five years, shewing a systematic course of conduct, a presumption of intent to defraud should arise, which, however, the accused might rebut in the manner mentioned in the section.

The adoption of this construction is, no doubt, open to the observation of my brother Magee, made during the argument, that it would permit a man who had been in business for five years, and had for four years and eleven months failed to keep books of account, to escape liability if he were astute enough to keep them for the remaining month; but that is a matter for the consideration of Parliament; our duty is to construe the section.

Conviction quashed.

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[APPELLATE DIVISION.]

McINDOO v. MUSSON BOOK CO.

Copyright—"Literary Composition"—Title or Name of Book—Infringement by Use of Similar Name—Copyright Act, R.S.C. 1906, ch. 70, sec. 4—Passing off—Reputation—Evidence—Finding of Trial Judge—Appeal—Costs.

An appeal by the plaintiff from the judgment of MASTEN, J., *ante* 42, was dismissed, no case being made by the appellant sufficient to warrant the Court in interfering.

The dismissal was without costs, because some of the members of the Court thought that there was ground for suspecting that there might have been an intention on the part of the defendant company, by the use of the title given to its book, to appropriate the benefit of the appellant's book.

APPEAL by the plaintiff from the judgment of MASTEN, J., *ante* 42.

January 10 and 11. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, J.J.A.

L. F. Heyd, K.C., and *E. C. Ironside*, for the appellant, argued that it was only necessary to prove that the conduct of the defendants was calculated to mislead the public, and that the appellant was not bound to establish that actual loss had been sustained. The appellant's book was before the public in such a way as to shew that it had an established reputation. They referred to the judgment of Mulock, C.J.Ex.D., in the "Shur-On" case, *Kerstein v. Cohen* (1906), 11 O.L.R. 450; *Rose v. McLean*

Publishing Co. (1897), 24 A.R. 240; *Wotherspoon v. Currie* (1872), L.R. 5 H.L. 508.

George Wilkie, for the defendant company, respondent, was not called upon.

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At the end of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.O.:—We have come to the conclusion that the appeal fails.

It was conceded by counsel for the appellant that the ruling of the learned Judge from whose decision the appeal is brought, that the appellant has no right by reason of his copyright to prevent the publication and sale of the respondent's book could not be successfully attacked; and, therefore, the case must rest upon there having been established a "passing off," as it is termed; and we do not think that such a case has been made out.

There is no evidence that, before the respondent's book was brought out, the name "Canadian Bird Book" had been attached, in the public's understanding, to the appellant's book, or that anybody, deceived by the alleged similarity of title, had purchased the respondent's book thinking that it was the appellant's; nor is there any evidence that any loss has been sustained by the appellant, or that there is a probability of loss by reason of the title of the respondent's book. The books are different in style, different in appearance and in price, and different in that they appeal to a different class of reader. The appellant's book was not intended to be sold to the book trade in the ordinary way. The only sale to the trade was to Mr. Britnell of fifty copies, and that was a special arrangement. The purpose of the appellant was to sell his book through the agency of canvassers and to the school authorities and to teachers.

Upon both grounds, therefore, we are of opinion that no case is made by the appellant sufficient to warrant us in interfering with the decision of the learned Judge.

Some of the members of the Court think that there was ground for suspecting that there may have been an intention on the part of the respondent, by the use of the title given to its book, to appropriate the benefit of the appellant's book; and, in view of that circumstance, we dismiss the appeal without costs.

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[APPELLATE DIVISION.]

Jan. 13.

SHEWFELT V. TOWNSHIP OF KINCARDINE.

Bond—Cancellation—Liability of Sureties—Right of Action.

The judgment of MEREDITH, C.J.C.P., ante 39, was affirmed.

APPEAL by the plaintiffs from the judgment of MEREDITH, C.J.C.P., ante 39.

January 13. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Kilmer, K.C., for the appellants, argued that his clients had satisfied all conditions imposed upon them by the bond, which is in no way different from any other debt or obligation: *Ascherson v. Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401. [MEREDITH, C.J.O., thought that case had no application; and MACLAREN, J.A., suggested that the matter was one which should be dealt with by the Legislature.] It has been the usual practice in similar cases to deliver up the bond for cancellation; and, if this is not done, the sureties might be disqualified from holding office in certain contingencies.

W. Proudfoot, K.C., and *P. A. Malcolmson*, for the respondent corporation, were not called upon.

At the conclusion of the argument for the appellants, the judgment of the Court was delivered by MEREDITH, C.J.O.:—Appeal by the plaintiffs from the judgment of the Chief Justice of the Common Pleas, dated the 29th November, 1915, after the trial of the action before him, sitting without a jury, at Walkerton, on the 9th day of that month.

No authority in support of the right of the appellants to the relief sought was cited, and we are of opinion that the action is not maintainable.

That a surety may bring an action to compel the principal debtor to pay off or discharge the debt or liability for which he has become surety, and to make the creditor a party to the action, may be admitted; but this is not that kind of an action.

If such an action as this would lie in any case, it would only be where all liability upon the bond was at an end.

Although, so far as is at present known, the condition of the bond in question has been satisfied, it must be borne in mind that it is a security available to the respondent if it should hereafter turn out that there have been breaches of duty by the treasurer which have not now been discovered, and the effect of the delivery up of the bond to be cancelled would be to deprive the respondent of that remedy or at all events to impair it.

While it is not intended to suggest that anything of the kind has occurred in the case of this treasurer, there have been many cases in which defalcations have occurred and have been concealed for years. One of the purposes of the bond in question was to protect the respondent against just such eventualities; and to give effect to the appellants' intention would be to deprive the respondent of that protection.

Appeal dismissed with costs.

[IN CHAMBERS.]

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Jan 14.

Evidence—Appeal from Award under Railway Act of Canada—Ascertainment of Reasons of Arbitrators—Examination of Arbitrator as Witness—Necessity for Leave of Appellate Court.

Upon an appeal from an award under the Railway Act of Canada, it is desirable to have the reasons of the arbitrators for making the award, either by the statement of a case or by the delivery of written reasons for the information of the Court. These must not be obtained *ex parte*, and the views of one arbitrator cannot be used unless, at least, all have had an opportunity of stating theirs. And the examination of one of the arbitrators, pending an appeal, is not the proper way of obtaining the needed information.

O'Rourke v. Commissioner for Railways (1890), 15 App. Cas. 371, 377, applied.

An appointment issued by the appellant, without the leave of the appellate Court, for the examination of one of the arbitrators as a witness with a view to elicit his evidence as such, for use on a pending appeal, was set aside.

Crowley v. Boving and Co. of Canada (1915), 33 O.L.R. 491, followed.

MOTION by the railway company, the respondents in a pending appeal from an award under the Railway Act of Canada,

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to set aside an appointment issued by a special examiner, at the instance of the land-owner, the appellant, for the examination of His Honour Judge Morgan, one of the arbitrators, to ascertain the reasons actuating the arbitrators in awarding the amount of compensation fixed by them, and how they arrived at their figures.

The motion was heard by HODGINS, J.A., in Chambers.

Angus MacMurchy, K.C., for the railway company.

W. R. Smyth, K.C., for the land-owner.

January 14. HODGINS, J.A.:—The desirability of having the reasons for an award given by the arbitrators, and their duty in that regard, in cases of appeals from awards under the Railway Act, is pointed out by Lord Macnaghten in *James Bay R.W. Co. v. Armstrong*, [1909] A.C. 624, at p. 631, and, in a case of municipal arbitration, by my brother Britton in *Re City of Peterborough and Peterborough Electric Light Co.* (1915), 8 O.W.N. 564. In both these cases wide powers existed for increasing or decreasing the amount awarded and for reviewing the evidence.

That information, however, must be got in a proper way: either by the statement of a case by the arbitrators, or, more usually, by the delivery of written reasons, for the information of the Court. These must not be obtained *ex parte*, nor can the views of one of the arbitrators be used unless, at least, all have had the opportunity of stating theirs.

The examination of one arbitrator, pending an appeal, is not the proper way of obtaining the needed information. No doubt the arbitrator is a competent witness in an action on an award, and I see no reason why he should not be as competent on an appeal if it involved similar questions. But the limits set by the House of Lords on his examination shew clearly that just what is here wanted cannot be obtained by way of evidence from an arbitrator.

In *O'Rourke v. Commissioner for Railways* (1890), 15 App. Cas. 371, at p. 377, Lord Watson says: "Their Lordships are also of opinion that the Court below erred in authorising a general examination of the arbitrators 'with a view to the pro-

thonotary informing himself as to the issues upon which the defendant succeeded.' The judgment of the House of Lords in *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418, upon which Windeyer, J., relied, is, when rightly understood, a direct authority to the contrary. The principle which was laid down by Cleasby, B., in that case (p. 433), and accepted by the House, was thus explained (p. 462) by Earl Cairns: 'He (i.e. the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire *is not admissible to explain or to aid*, much less to attempt to contradict (if any such attempt should be made) *what is to be found upon the face of that written instrument*.' In this case it is obvious that an examination of the arbitrators would not disclose how far the defendant had succeeded, unless they were asked what sum, if any, they had awarded to the appellants under each count of the declaration—a line of examination which is plainly incompetent."

As the proceeding taken by the appellant here is for an examination of the arbitrator as a witness with a view to eliciting his evidence as such, for use on a pending appeal, it falls within the decision of the Second Divisional Court in *Crouley v. Boving and Co. of Canada* (1915), 33 O.L.R. 491. The principle of that decision and of the cases which it follows is not avoided by saying that it is not really evidence that is wanted, but merely information which it would be proper to bring before the Court if obtained in another way.

I must deal with the proceedings as I find them, and they are for an examination of the arbitrator as a witness.

Appointment set aside. Costs to the respondents in the pending appeal.

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[IN CHAMBERS.]

Jan. 14.

RE HARTY V. GRATTAN.

*Division Courts — Jurisdiction — Ascertainment of Amount over \$100—
Division Courts Act, R.S.O. 1914, ch. 63, sec. 62 (1) (d)—Cheque—
Loan—Evidence.*

Where the claim exceeds \$100, a Division Court has no jurisdiction unless the claim is ascertained as a debt by a document signed by the defendant, and the plaintiff's case is proved without other evidence than the proof of the signature: The Division Courts Act, R.S.O. 1914, ch. 63, sec. 62 (1) (d).

Slater v. Laberee (1905), 9 O.L.R. 545, and *Renaud v. Thibert* (1912), 27 O.L.R. 57, followed.

The plaintiff's claim upon a cheque for \$150, drawn by him upon his bankers, payable to the defendant, endorsed by the defendant, and said to have been cashed by him, was held to be beyond the jurisdiction of a Division Court.

The cheque was evidence of the payment of money only, and not proof of a loan.

Quære, whether what was stamped upon the cheque by the bankers could be looked at to shew that the cheque was cashed by the defendant.

Prohibition was granted.

MOTION by the defendant for prohibition to a Division Court.

January 14. The motion was heard by MIDDLETON, J., in Chambers.

Harcourt Ferguson, for the defendant.

C. M. Garvey, for the plaintiff.

MIDDLETON, J. (on the same day) :—The claim exceeds \$100, and the Division Court has no jurisdiction unless the claim is ascertained as a debt by a document signed by the defendant, and the plaintiff's case is proved without other evidence than the proof of the signature.* The statute is plain, and the cases of

*The Division Courts Act, R.S.O. 1914, ch. 63, sec. 62 (1) (d): "Save as otherwise provided by this Act, the Court shall have jurisdiction in:

"(d) An action for the recovery of a debt or money demand where the amount claimed, exclusive of interest whether the interest is payable by contract or as damages, does not exceed \$200 and the amount claimed is

"(i.) Ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or—

"(ii.) The balance of an amount not exceeding \$200, which amount is so ascertained or—

"(iii.) The balance of an amount so ascertained which did not exceed \$400 and the plaintiff abandons the excess over \$200.

"An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

Slater v. Laberee (1905), 9 O.L.R. 545, and *Renaud v. Thibert* (1912), 27 O.L.R. 57, have well expounded its meaning.

The plaintiff's claim is upon a cheque for \$150, drawn by him, payable to the defendant. The cheque is endorsed; and, if the stamps on it may be regarded, as to which I have much doubt, the cheque was cashed by the defendant.

This, it is said, proves the loan and calls upon the defendant to shew that the money he received was not lent to him. I do not think this is so. When the parties to an action were not competent witnesses this question frequently arose, and the cases, which may be found well collected in Grant's Banking Law, 6th ed., p. 94, uniformly determined that the cheque was only evidence of the payment of money, and not proof of a loan, for the payment might equally well have been on account of a pre-existing debt or might have been a gift.

In addition to the English cases, there are several Canadian cases to the same effect—e.g.: *Foster v. Fraser* (1841), R. & J. Dig. 652; *Allaire v. King* (1908), Q.R. 33 S.C. 343.

It is, therefore, clear that there was no jurisdiction in the Division Court to entertain the action, and the motion must succeed.

Prohibition granted, with costs fixed at \$25.

[APPELLATE DIVISION.]

McKINNON V. DORAN.

Contract—Purchase of Bonds of Railway Company—Broker Becoming Purchaser—Evidence—Correspondence—Memorandum in Writing—Statute of Frauds, R.S.O. 1914, ch. 102, sec. 2—Interest in Land—Misrepresentations—Terms of Contract—Waiver.

An appeal by the defendant from the judgment of CLUTE, J., 34 O.L.R. 403, was dismissed, the four members of the appellate Court being divided in opinion.

Held, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J., (1) that the defendant was the purchaser of the bonds, and not merely the plaintiffs' agent to sell; (2) that the alleged misrepresentation of the plaintiffs, to the effect that the bonds had not previously been offered for sale in New York, was without effect, if in fact it was made, and the defendant, at all events, treated the contract as in force after discovering the falsity of the alleged representation; (3) that, if the sale was subject to the favourable opinion of the defendant's solicitor as to the legality of the bonds, that term was waived by the defendant; and (4), assuming in favour of the defendant that the bonds were such as would come within

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sec. 2 of the Statute of Frauds, that the statute was met by the correspondence between the parties: the subject of the contract, if uncertain, was ascertainable—*id certum est quod certum reddi potest*. Therefore, all the defences failed.

Held, by MAGEE, J.A., and LATCHFORD, J., that the defendant was entitled to succeed upon the defence of the Statute of Frauds: it could not be said that he had in writing acknowledged that he had agreed to pay the amount which the plaintiffs claimed; in the absence of evidence, it was not to be presumed that the statute was not still in force in Alberta; so that, whether the law of Alberta or of Ontario should govern, there must be a memorandum in writing; the bonds referred to the trust deed which conveyed the real property of the railway company to the trustees to secure the payment.

APPEAL by the defendant from the judgment of CLUTE, J.,
 34 O.L.R. 403.

December 2 and 3, 1915. The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., RIDDELL and LATCHFORD, JJ.

N. W. Rowell, K.C., for the appellant, contended that he was not himself a purchaser, but was simply the plaintiffs' agent to sell the bonds. The plaintiffs falsely represented to the appellant on the 29th May, 1914, that the bonds had not been previously offered for sale in New York, and any subsequent sale failed because of this: *Carrique v. Catts and Hill* (1914), 32 O.L.R. 548. The Statute of Frauds applies, and there was no memorandum in writing of the bargain (even if there was such a bargain) sufficient to satisfy the Statute of Frauds: *Taylor v. Smith*, [1893] 2 Q.B. 65; *Potter v. Peters* (1895), 72 L.T.R. 624; *Holmes v. Mitchell* (1859), 7 C.B.N.S. 461; Halsbury's Laws of England, vol. 7, p. 370, para. 762; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. The sale, if any, was subject to the approval of the appellant's solicitor, and this had not been obtained.

J. B. Clarke, K.C., for the plaintiffs, respondents, contended that the appellant had purchased the bonds for himself, and was not the plaintiffs' agent to sell. As to the alleged misrepresentations and their effect on a subsequent sale, the evidence shewed that, after the appellant knew that the bonds had previously been offered for sale in New York, he confirmed the contract. The Statute of Frauds had no application. These shares were not an interest in land, there being no evidence that the company owned land, or as to whether the Statute of Frauds was

law in Alberta: *Driver v. Broad*, [1893] 1 Q.B. 744; Halsbury's Laws of England, vol. 27, pp. 227, 228, paras. 458, 459.

Rowell, in reply.

January 19, 1916. MAGEE, J.A.:—The defendant appeals from the judgment against him for \$16,911.77 and interest, as damages for not carrying out an alleged agreement by him to buy from the plaintiffs bonds of the par value of \$223,700 made by the Lacombe and Blindman Valley Electric Railway Company, guaranteed by the Province of Alberta.

The evidence fully warrants the finding that the defendant verbally agreed, on the 2nd June, 1914, to buy the bonds himself, and was not acting either as agent for the plaintiffs or ostensibly as agent for any disclosed or undisclosed principal in Ontario or elsewhere. That he expected to make, with his associate in New York, a dealer's profit without accountability to any one, and not an agent's commission, is, I think, manifest. He has not chosen to disclose at what price he had arranged to sell the bonds. Although a 'so-called "commission" was to be allowed him by the plaintiffs on the purchase, the word was manifestly used, ultimately at least, in the sense of a deduction equal to a commission.

Into the merits of his defence that the plaintiffs untruly represented to him on the 29th May, 1914, that the bonds had not previously been offered for sale in New York, I do not propose to enter. Intentionally or otherwise, the plaintiffs have left his statement that such a representation was made, not specifically denied, and it would seem at least that he was disagreeably surprised to find his almost completed resale of the bonds in New York blocked owing to a previous attempt of the plaintiffs to sell them there. Nor, in the view which I take of the legal result, need I consider whether, after learning of the untruthfulness of the alleged misrepresentation, he condoned and waived it, and ratified his purchase by his subsequent negotiations.

But one question is, whether there was a memorandum in writing of the bargain, signed by him, sufficient to satisfy the Statute of Frauds, if that statute applies. There were numerous conversations by telephone and *vis-à-vis* between the de-

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defendant and the plaintiffs, and also between him and Edmund Daude, his associate in New York, and between the latter and the plaintiffs; but it is to the letters and telegrams, as the only writings, that we must look, except for explanation of the circumstances when necessary. The only documents that appear to me to be at all necessary to be referred to for the purposes of the statute are the following:—

1. The printed circular issued by the plaintiffs beginning and ending with their name and stating, "We own and offer \$250,000 five per cent. first mortgage bonds . . . price \$100.77 and interest to yield 4.95 per cent.," and setting forth the date of maturity and name of the issuing railway company and other particulars and fact of guarantee by the Province. One of these circulars, with the amount changed to \$230,000, was left with the defendant on the 26th May, 1914, by Norman Davies, of the plaintiffs' office.

2. Letter of the same date, 26th May, from the defendant to Daude, enclosing that circular and stating: "Mr. Norman Davies, one of the firm of W. L. McKinnon & Co. . . . called on me to-day to see if I could handle \$230,000 worth of bonds of the Province of Alberta. They originally had \$250,000, but have disposed of \$20,000, leaving a balance which they now have of \$230,000. Selling price, etc., explained in the enclosed circular. All the commission they can offer us is half of one per cent., which equals to us \$1,150. Can you handle these? If so, kindly let me know by wire."

3. Telegram from the defendant to Daude of the 29th May, 1914: "McKinnon will sell Alberta bonds \$223,700 less \$2,500 to us subject to Toronto payment and delivery small quantity sold since writing."

4. Telegram from the defendant to Daude of the 3rd June, 1914: "The Alberta bonds which you have particulars of no one else has for sale. I absolutely bought them yesterday after our 'phone conversation they agreeing to our terms—put sale through at once."

5. Telegram of the 15th June from the defendant to Daude: "All Alberta bonds we have are guaranteed by Province

Alberta and certified by Canada Trust Company. McKinnon wants this matter closed . . . answer."

6. Letter of the 15th June from the plaintiffs to the defendant: "Re \$223,700 Prov. of Alberta (guaranteed) bonds, bearing 5 per cent., maturing 1943. We are enclosing our statement covering the above bonds, figured as at to-morrow, June 16th, shewing the value as at that date to be \$224,585.98, which we trust you will find to be correct. As we understand that funds are now being transferred here from New York, and that you wish to take delivery to-morrow, we shall try to get in touch with you by telephone in the morning in order to ascertain an hour for delivery to suit your convenience."

The statement enclosed reads: "J. J. Doran, Esq., in account with W. L. McKinnon & Co. Statement figured as at June 15. To purchase \$223,700 Prov. of Alberta bearing 5% payable Oct. 22, April 22, and maturing Oct. 22, 1943.

Value at 4.95% (100.775)	\$225,433.68
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Accrued interest on \$225,433.68 at 4.95%	
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from April 22 to June 16 (55 days)...	\$1,681.49
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Less int. on int., 128 days	29.19
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—————	\$ 1,652.30
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	\$227,085.98
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Less \$2,500	2,500.00
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	\$224,585.98
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7. Telegram from the defendant to Daude of the 16th June: "Alberta bonds must be paid for to-day—McKinnon statement shews them worth \$227,085.98 less our commission \$2,500 or \$224,585.98 to them. Answer at once."

There were other letters from the plaintiffs besides that of the 18th June above quoted, notably a letter from them to the defendant of the 2nd June, of which the defendant denies receipt, but which, although the evidence of mailing is not clear, the learned trial Judge considered he must be taken to have received. That letter, therefore, in the ordinary course of post, may or may not have been received before the defendant's telegram to Daude of the 3rd June was sent. It reads thus:

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“Following your telephone conversation with our Mr. McKinnon, we take pleasure in confirming to you the sale of \$223,700 Province of Alberta (guaranteed) bonds bearing 5 per cent., payable semi-annually, maturing October 22nd, 1943. The price is a rate to yield you 4.95 per cent., less an allowance to you of \$2,500. The legal opinion of J. B. Clarke, K.C., has already been obtained; however, the legal files are not as yet completed. Mr. Clarke is at present out of town, and upon his return, which is expected in a few days, we will take the necessary steps to have the legal papers completed and forwarded to you in order that your solicitor may approve legality.”

There is a telegram of the 22nd July from the plaintiffs to Daude saying, “. . . Value to-day basis sale to Doran is \$225,680,” and letter of the 11th August from the plaintiffs to the defendant: “Re \$223,700 Province of Alberta guarantee debentures, 5 per cent., 1943, sold you by us on June 2nd last,” reporting sale of \$15,000 of the bonds. But none of these two letters or telegram is referred to or indicated even remotely in any letter or telegram from the defendant, or from Daude, whose agency for the defendant is asserted by the plaintiffs in their letter of the 14th August to him. Nothing else in the correspondence appears to me to have any bearing upon the present question.

I may also here note that the defendant swears that on the 5th June he had refused to sign confirmation of the sale to him, and he is not contradicted nor even cross-examined as to the truth of that statement. It is not disputed that on the 31st July he refused to sign such a confirmation in the absence of Daude and without his consent. His telegram of the 3rd June to Daude that he had absolutely bought the bonds is not wholly inconsistent with a purchase really as agent, but on its face must be taken against the defendant as meaning a purchase for himself.

It appears to me clear that up to and after the sending of the defendant's telegram of the 3rd June, and his subsequent one of the 15th June, there was no compliance with the statute. There was nothing whatever in writing to shew what “our terms” were, or upon what terms the purchase had been made;

even assuming that the identity of the property bought and of the vendor was sufficiently disclosed. The utmost that can be gathered, if so much can be gathered, up to this stage, is, that he has bought from the plaintiffs the bonds of this railway company, guaranteed by Alberta, to the amount of \$223,700, on some unknown terms—unknown both as to amount and time.

Then comes his telegram to Daude of the 16th June; and let us assume in the plaintiffs' favour that the words "Alberta bonds" therein sufficiently refer to these bonds. The defendant's witness Daude swears there were no other. Let it be assumed also in the plaintiffs' favour that by the words "McKinnon statement" in that telegram the defendant has incorporated in it the statement of the 15th June sent to him by the plaintiffs, in which he is debited "in account with" the plaintiffs and charged "To purchase."

What more can then be read from all the writings than: "On the 2nd June I bought these bonds, \$223.700 of this railway, from McKinnon & Co. They must be paid for this 16th June, and they have sent me a statement calculating the price at \$224,585.98 and debiting me, as purchaser, with that amount. Answer."

It is a good deal to assume that so much can be spelled out of the telegrams. But can it be said that he is, in writing, acknowledging that he had agreed to pay that amount which the plaintiffs claimed? It does not appear to me that it can.

I agree with the learned trial Judge that the Statute of Frauds applies. In the absence of evidence, it cannot be presumed that the statute is not still in force in Alberta; so that, whether the law of that Province or of Ontario should govern, there must be a memorandum in writing. The bonds refer to the trust deed which conveys the real property of the railway company to the trustees to secure the payment.

I would allow the appeal with costs.

LATCHFORD, J.:—I agree.

RIDDELL, J.:—This is an appeal by the defendant from the judgment of Mr. Justice Clute, 34 O.L.R. 403.

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The plaintiffs, a firm of bond brokers in Toronto, had some \$250,000, five per cent., first mortgage bonds of an electric railway company in Alberta, guaranteed by that Province, which they desired to sell. They issued a circular offering them for sale at \$100.77 and interest to yield 4.95 per cent.

Believing that the defendant, who also did something in the way of such financial business, might be induced to buy, the plaintiffs sent their employee Davies to him: Davies gave him a circular and offered him the bonds—the defendant, who would dispose of the bonds in the United States market, objected because of the income tax; this was explained to his satisfaction in a subsequent interview, and the defendant took up the proposition in earnest. These interviews took place on the 26th May, 1914, and the terms offered were such as to allow the defendant to make one-half of one per cent., i.e., \$1,150, if he should resell at the circular price—this sum is more than once called “commission,” but the whole correspondence and course of dealing shew that the transaction was one of sale out and out—and the word “commission” is used in a technical and trade sense as indicating the amount of profit the purchaser would make if he resold at the ostensible (circular) price.

The defendant sent the circular and terms of offer to his colleague, one Daude, in New York—Daude replied saying the “commission” was not enough, that, as it had to be divided amongst three persons in the sale which he had in mind to make, \$2,500 was required.

On the 28th May, Davies and one of the plaintiffs, Pettes, called on the defendant: he informed them of what his colleague Daude had said: the plaintiff Pettes thought the new terms would be satisfactory, and, according to the defendant’s story, said, “These bonds should be easily sold in New York, because they had not been offered there previously.” Much argument took place on this appeal in reference to this alleged representation by Pettes, and it will receive consideration later.

To continue the narrative—Pettes returned to his office, the suggested new terms were agreed to, and the defendant informed by telephone. Thereupon he sent a telegram to his colleague Daude: “McKinnon will sell Alberta bonds \$223,700 less \$2,500

to us subject to Toronto payment and delivery small quantity sold since writing:" the defendant at the telephone interview had told Pettes that he would have to communicate with New York by wire, and that he expected to receive confirmation immediately by the same medium. On the 30th May, the defendant wired Daude: "McKinnon wants confirmation re Alberta bonds answer." Receiving no reply, he called up Daude on the long distance telephone, and from what then passed resulted what is best described in his own telegram to Daude next day: "The Alberta bonds which you have particulars of no one else has for sale. I absolutely bought them yesterday after our 'phone conversation they agreeing to our terms—put sale through at once."

On the 2nd June, the plaintiffs wrote the defendant setting out the sale fully, and saying that the legal opinion, etc., would be sent along in a few days. On the 5th June, the complete legal file was handed to the defendant—he had stipulated that the sale would be subject to his approval as to the legality of the bond-issue—upon that day, apparently, the defendant declined to sign a contract of sale, but it was arranged that the transaction should be closed out at Toronto about the 15th or 16th. The legal file was sent at once by the defendant to his New York associate; but, for some reason, it was desired that the plaintiffs' solicitor should give his opinion direct to the defendant. This was done on the 8th June, in letters substantially duplicates of those furnished the defendant on the 5th June: this was submitted by the defendant to his solicitor in Toronto, he conferred with the plaintiffs' solicitor, and wrote the result to the defendant on the 9th June—no objection was or could be taken to the validity of the bonds.

The time came for the delivery of the bonds, but Daude had not sent the money to pay for them. The defendant wired him on the 15th June: "All Alberta bonds we have are guaranteed by Province Alberta and certified by Canada Trust Company. McKinnon wants this matter closed . . . answer." No answer came, and next day the defendant again telegraphed: "Alberta bonds must be paid for to-day—McKinnon statement shews them worth \$227,085.98 less our commission \$2,500 or \$224,585.98

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to them. Answer at once." The plaintiffs had on the 15th June delivered a statement shewing the purchase-money made up in the usual way—the present value at the rate specified in the circular was computed for the preceding gale-day, the 22nd April, 1914, and found to be \$225,433.68

Interest was then computed at 4.95 per cent. from the 22nd April to the 16th

June	\$1,681.49	
Less interest on interest	\$29.19	
		<hr/> 1,652.30
		<hr/>
		\$227,085.98
Less		2,500.00
		<hr/>
		\$224,585.98

The amount can be readily calculated by any mathematician with a table of logarithms or ordinary financial tables—and, while a meticulous mathematician might find fault with the method, the result is substantially the correct one.

There can be no doubt that the defendant was doing his best to have the sale closed out, but his associate in New York had not furnished the necessary money.

The sale which Daude had expected to make in New York had fallen through—he writes the defendant on the 18th June: "Re Alberta bonds. Stone Webster & Co. would take these bonds and pay immediate cash if given construction of the railway. Would buy them at regular rates. . . . Wire me if such a deal could be made and could get more money for the McKinnon people and ourselves"—he also asked about the construction company referred to in the legal file.

The plaintiffs kept pressing the defendant for a settlement, and were told on each occasion that the money was expected from New York. On the 17th June, the defendant had said that the plaintiffs would have to explain why Harris Forbes & Company of New York had turned down the bonds, but was told by one of the plaintiffs that that had nothing to do with the transaction—the sale was to him "subject to legality"—and he does not seem to have pursued the matter further: he did not raise

any question as to legality, and the sole reason for not completing the sale was the lack of funds.

On the 18th June, the plaintiffs were again urging completion; the defendant admitted legality, but was awaiting the promised funds; on the 20th and 22nd June, much the same thing took place. On the 23rd June, the defendant went to New York, and on the 26th June the plaintiffs wired him: "When will you take delivery Albertas? Expect hear from you twenty-fourth." The defendant replied by wire of the 28th June: "Delay greatly your fault, doing best settle matter fast as possible, impossible settle by twenty-fourth—will close deal soon as possible, expect have situation settled by Friday—Claplin failure hurt market—money situation very bad—if necessary hold bonds subject to prior sale by you." On the 29th June, the plaintiffs replied by wire denying all fault: "We have done everything agreed to from first. Please arrange delivery Friday July 3rd without fail. Impossible for us offer bonds as we advised all clients interested that bonds had been sold June 2nd." The defendant answered by letter on the 30th June: "The delay is your fault, as these bonds were sold to parties here, who, after hearing that the Forbes people had turned it down, reconsidered the matter, and will do everything possible to bring this matter to an immediate close by date requested."

The defendant returned from New York with Daude, and on the 7th July they called on the plaintiffs; Daude explained how his expected sale had fallen through, and that he had placed the sale of these bonds in the hands of Mr. Zuckerman, a prominent member of the New York Stock Exchange, with instructions to sell immediately, at a price to let him out; that, if at all possible, he (Daude) would arrange it, and that quick action would be gotten—that the plaintiffs might rely upon them, i.e., Doran and Daude, taking the bonds by the 14th July; that they would either sell them or take them from the plaintiffs and carry them themselves.

On the 9th July, the defendant informed the plaintiffs that Daude had received a telegram from Zuckerman, "No chance of making time loan on Albertas," and added that Daude would wire a financial friend and arrange for the loan.

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On the 13th July, Daude called on the plaintiffs and told them that it was impossible for his party to sell—he had in fact received a telegram from Zuckerman on the 7th July, “Practically impossible to make sale Albertas.” The learned trial Judge held that what was said by Daude was not evidence, and I give it here simply as narrative. On the 15th July, Daude and the defendant informed the plaintiffs that they had given up hopes of selling the bonds, and were trying to arrange a time loan for them—the plaintiffs had agreed that if the defendant could arrange a time loan for them on the bonds, they would release the defendant from his contract to buy: such loan never was arranged, and I pay no further attention to it—the scheme finally failed about the 30th July.

On the 24th July, the plaintiffs had an opportunity to sell 15,000 at \$99.25 and interest, Montreal delivery—they telegraphed to the defendant, then in New York, asking if they might sell, and Daude answered: “If you consider good sale use your own judgment. Negotiating with Bank Montreal.” The sale was made and approved by the defendant: on the 25th July, a letter is written by Daude to the plaintiffs in reference to this sale of 15,000 bonds. On the 31st July, the plaintiffs wrote to the defendant: “Please take notice that we require from you tomorrow, August 1st, either a marked cheque for \$8,000 as margin for a call-loan on these debentures, together with your signature on the usual call-loan form, or we want from you a cheque in payment in full for the above bonds . . . If you do not have this cheque and the bonds are sold you will require to bear the consequences, although we positively shall not sell the bonds unless we are forced to do so, as we desire to protect your interests as fully as we possibly can.” This was handed to the defendant, and he agreed to put up the \$8,000 next day: this was not done. On the 4th August, Daude called on the plaintiffs, and, expressing unwillingness to commit himself in writing, said he was morally but not financially responsible for the transaction—Daude then attempted to get the loan, but failed, and at length defied the plaintiffs.

On the 11th August, a statement was rendered by the plaintiffs to Daude and the defendant of the 15,000 sale, shewing

that at the sale price at which the defendant bought there was a net loss of \$68.53—they asked the defendant for a cheque for the amount, also asking for the “margin” promised on the 31st July. On the 12th August, the plaintiffs made a demand that the defendant should straighten the matter out.

On the 13th August, Daude returned to the plaintiffs the legal opinion which he said they had “loaned” him: the next day the plaintiffs indignantly deny that they had loaned it to him, and state the facts. They also wrote the defendant telling him that he knew well that they had sold the bonds to him—that he had expressed himself satisfied with their legality—and asking what he proposed to do in the matter.

Daude thereafter, with transparent cunning, endeavoured to get the plaintiffs to put a price on the bonds: the plaintiffs refused to have anything to do with him, and said the bonds were not theirs, but they had been sold to the defendant.

On the 18th September, the defendant was notified by the plaintiffs that he must take delivery of and pay for the balance of the bonds by the 15th October, or they would sell them and look to him for the balance.

On the 20th and 21st November, proper advertisements were inserted in financial and other papers, and the defendant notified. The bonds were sold at the best price available, and a net loss experienced of \$16,911.77. A statement was sent to the defendant and a settlement required: the money not having been paid, the plaintiffs sued.

The defendant set up: (1) that he was only the plaintiffs’ agent to sell; (2) that, if he agreed to buy the bonds, the “agreement was procured by false and fraudulent misrepresentations made by the plaintiffs and relied upon by the defendant;” (3) that the sale, if any, was subject to the approval of the defendant’s solicitor, which had not been obtained; (4) and he pleads the Statute of Frauds, R.S.O. 1914, ch. 102.

At the trial before my brother Clute, judgment was directed for the plaintiffs for \$17,606.78 (being \$16,911.77 and interest from the teste of the writ) and costs.

The defendant now appeals.

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With a tolerably large experience in financial matters and a tolerably extensive acquaintance with brokers and other financial men, I have never seen a more bare-faced attempt to get out of a plain and simple bargain, and to defraud a vendor. But, glaringly dishonest as the conduct of the defendant is, he is entitled to the law as we may find it to be.

The first defence fails—it is a dishonest attempt to take advantage of the word “commission,” as shewing that the defendant was an agent to be paid by commission. Over and over again he speaks of the transaction as a sale, and so do the plaintiffs, without protest—the plaintiffs’ letter of the 2nd June to him and his of the 3rd June to Daude are sufficient to refer to here.

The sole foundation for the second defence is the statement of the defendant that Pettes on the 29th May “stated that these bonds should be easily sold in New York, because they had not been offered there previously.” That the bonds had been offered in New York is certain, and the fact is not denied.

The defendant does not swear that this statement had any influence upon him; but this would not be conclusive against him—if the statement is “of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement:” *per* Lord Blackburn in *Smith v. Chadwick* (1884), 9 App. Cas. 187, 196; *Hughes v. Twisden* (1886), 55 L.J. Ch. 481; *In re London and Leeds Bank Limited, Ex p. Carling* (1887), 56 L.J. Ch. 321. This inference is not a necessary inference *juris et de jure*: *per* Jessel, M.R., in *Smith v. Chadwick* (1882), 20 Ch. D. 27, 44; *per* Halsbury, C., in *Arnison v. Smith* (1889), 41 Ch. D. 348, 369. In view of the facts of the case and the want of prominence given to the alleged misrepresentation, I should not hold that the alleged misrepresentation had any effect *dans locum contractui*.

But, in any case, after the defendant discovered the falsity of the alleged representation, he did not repudiate, but continued on, recognising the contract as in full force; that in

itself would prevent his taking advantage of such a defence: *Clough v. London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330; *Selway v. Fogg* (1839), 5 M. & W. 83; *Vigers v. Pike* (1842), 8 Cl. & F. 562; and hundreds of other cases.

Moreover, as there is no express contradiction of the statement—probably from oversight of counsel (and all who have had much experience of counsel practice can understand how that might happen)—I have seen the learned trial Judge, and he informs me that he did not believe the defendant in that regard. The point is not mentioned in the learned Judge's reasons for judgment, and does not seem ever to have been pressed except before us. The second ground of defence also fails.

The third ground, even if based on fact, is not open to the defendant: he expressly approved the legality, probably (although that is not of any consequence) because of his solicitor's advice—even if such an opinion had been stipulated for, it was waived by the defendant, independently of the effect of his attempted repudiation of the contract.

The sole ground of defence which requires serious consideration is the fourth, that of the Statute of Frauds.

Whether these bonds are such as come under the 4th section of the Statute of Frauds (sec. 2 of R.S.O. 1914, ch. 102) is a question of great interest from a purely legal point of view—I do not enter upon the inquiry, but assume in favour of the defendant that they are so.

Nor do I dwell upon the doctrine of *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, followed in *Kendrick v. Barkey* (1907), 9 O.W.R. 356 (see p. 362), that the Statute of Frauds will not be permitted to assist in committing a fraud.

It seems to me that the statute is fully met—e.g., in the telegram of the 3rd June the defendant asserts that he has absolutely bought “the Alberta bonds which you have particulars of”—his correspondent had received particulars of the bonds in question by a circular sent him by the defendant: the terms appear in the telegram of the 29th May: “McKinnon will sell Alberta bonds \$223,700 less \$2,500 to us subject to Toronto payment and delivery small quantity sold.”

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The bonds were those Alberta bonds McKinnon was selling—what they were, even if uncertain, could be rendered certain—*id certum est quod certum reddi potest*.

In *Owen v. Thomas* (1834), 3 Myl. & K. 353, the letter relied upon was: "I have this day sold the house, etc., in Newport to Mr. John Owen for 1,000 guineas . . . the money to be paid as soon as the deeds can be had from Mr. Deere; and you will be pleased to lose no time in getting them from him"—the letter was addressed by the vendor to his solicitor. The Court (Sir John Leach, M.R.) held that, as the house referred to in the letter was that the deeds of which were in the possession of Mr. Deere, it might easily be ascertained—*id certum est quod certum reddi potest*. In the present case we have quite as definite a statement.

Plant v. Bourne, [1897] 2 Ch. 281 (C.A.), is another case of somewhat the same kind. In *Ogilvie v. Foljambe* (1817), 3 Mer. 53, "Mr. Ogilvie's house" was held a sufficient description; so in *Shardlow v. Cotterell* (1881), 20 Ch. D. 90, "the property purchased at £420 at Sun Inn;" and in *Bleakley v. Smith* (1840), 11 Sim. 150, "the property in Cable-street." See also Sugden on Vendors and Purchasers, 14th ed., p. 134; Fry on Specific Performance, 5th ed., pp. 166, 169.

The alleged term that the sale should be subject to the legal opinion of the defendant's solicitor, it is said, does not appear in writing. But that is not a term of the contract at all—it is a condition without which there could be no sale, and could be proved by parol *dehors* the contract.

I am glad that this deliberate attempt at fraud cannot succeed.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B.:—I agree in the result arrived at by my learned brother Riddell.

In the result, as the Court is equally divided, the appeal is dismissed with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

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Jan. 20.

BEAMENT V. FOSTER.

Will—Action to Establish—Due Execution—Testamentary Capacity—Evidence—Onus—Insane Delusion not Affecting Testator's Dispositions—Finding of Fact of Trial Judge—Appeal—Authority of Decided Cases—Parties—Judgment—Persons Interested not before Court.

In an action to establish a will, against opposition based upon the alleged mental incapacity of the testator, the onus is, in the first place, upon him who propounds that will, but that onus is sufficiently satisfied by proof of the execution of the will in the manner required by law, by an apparently competent testator; and the onus then shifts to him who opposes the will; that onus is in turn satisfied by proof of an insane delusion; and then the onus shifts back to the propounder of the will—the onus of proof sufficient to satisfy the conscience of the Court that the dispositions of his property made by the testator in the will were not affected by the insane delusion.

In this case, it was proved that the testator was subject to an insane delusion; but the trial Judge found that the dispositions made by the testator were not affected thereby, and admitted the will to probate; and, upon appeal, the Court declined to interfere with that finding upon a question of fact, no error in law being shewn.

A finding of fact in one case cannot have any binding effect in any other case, except by way of estoppel. In this case, the will itself bore testimony against the contention that it was made as it was because of the testator's insane delusion; and the statement attributed to the trial Judge that he was bound by the authority of *Skinner v. Farquharson* (1902), 32 S.C.R. 58, to find as he did, meant no more than that, acting upon the principle applied in that case—that, when the provisions of the will itself prove that it was not affected by insane delusions, it must be found that it was not so affected—he was bound to find in favour of the will in this case.

The parties to the cause being only the executor, propounding the will, and the testator's son—one of the beneficiaries under it—opposing the will, it was pointed out that the judgment was binding only between the parties and could not prejudicially affect any person interested not before the Court.

APPEAL by the defendant from the judgment of the Surrogate Court of the County of Carleton in favour of the plaintiff, the executor named in the will of Robert Foster, deceased, in an action to establish the will, arising out of the plaintiff's petition for a grant of letters probate.

The opposition to the will was chiefly based on the alleged mental incapacity of the testator, who was said to have been subject to insane delusions.

January 20. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Glyn Osler, for the appellant, argued that the evidence

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clearly shewed that the testator suffered from insane delusions, and that the propounder of the will had failed to establish that these delusions had not affected the disposition of his property. He submitted that the learned Judge's findings had been based entirely on the judgment in *Skinner v. Farquharson* (1902), 32 S.C.R. 58. *McIntee v. McIntee* (1910), 22 O.L.R. 241, was a similar case.

A. H. Armstrong, for the plaintiff, respondent, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—This appeal arises out of contentious business in the Surrogate Court of the County of Carleton. The plaintiff is the executor of the last will of Robert Foster, deceased, and, as his duty required, he brought the will into that probate Court and took the usual proceedings there, in common form, to obtain a grant of probate of it.

The testator's only child and heir at law—the appellant and the only defendant in the Surrogate Court cause—interposed for the purpose of resisting the grant, and thereupon the proceedings assumed the contentious form and were duly carried down to trial in that Court.

The cause was tried by the Judge of the Court—a Judge of great experience in matters testamentary—without the intervention of a jury; and eventually the will was upheld and a grant of probate directed.

The main, if not the only, opposition to the will was based upon mental incapacity, it being said that the testator was subject to insane delusions.

It is undeniable that he was subject to insane delusions—a delusion, it is said, that his own wife and his son's wife desired and attempted to poison him, and a delusion, it is also said, as to his wife's chastity; that he was subject to the former delusion was well proved; I doubt very much the assertion as to the latter; an aggravated form of jealousy not unknown, if indeed extremely uncommon, in human beings, may have been the cause of all that was said or done in this respect; and, however it may,

be, it is not a matter of very great consequence in this action, in view of the other delusion.

The law relating to trials of such cases as this is quite familiar. The onus of proof that the document propounded is in truth the last will of a capable testator is, in the first place, upon him who propounds that will, but that onus is sufficiently satisfied by proof of the execution of the will in the manner required by law, by an apparently competent testator; and the onus then shifts to him who opposes the will, and that onus is in turn satisfied, in such a case as this, by proof of an insane delusion such as was proved in this case, and then the onus shifts back to the propounder of the will—the onus of proof sufficient to satisfy the conscience of the Court that the dispositions of his property made by the testator in the will were not affected by the insane delusion.

It is not suggested that the learned Surrogate Judge erred in any matter of law throughout the trial, or that he disregarded in any way the law applicable to the trial of such a cause as this; the appeal is one entirely upon a question of fact, a question of fact determined by a Judge of much experience and care, and one who had the benefit, which we have not, of hearing and seeing the witnesses. It is obvious, therefore, that we cannot rightly reverse his finding unless well convinced of error in it.

During the last nine months of his life the testator lived, and then died peacefully, in his own home, with the two women who, he sometimes thought, wished to poison him, and as the husband of one of them. His delusion must have been absent or much attenuated then; and indeed all his married life was spent with his wife, as man and wife, and with his son and his son's wife as part of the family after the son's marriage; with the exception of two or three short absences, caused, it is said, by his fear of being poisoned by these women; so that his delusion could not have been a very wide-spreading delusion in its effect. It had no effect upon his business capacity or business transactions; his family physician described that capacity as "splendid;" but, like many another delusion, it was a thing to talk about, if opportunity given, but forgotten when business had to be attended to.

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Once, when it had greater possession of him than usual, he left his home on account of it, but soon returned again; and once, when ill enough to go to a hospital for treatment, dangerously ill with the disease called "double pneumonia," he was taken to such an institution, because, it was said, his delusion possessed him so that it was thought it might interfere with his treatment and recovery. But the outstanding facts are that, speaking generally, during all the years of his affliction he lived with his wife as her husband without violence towards her or other conduct but such as might have been if he were never subject to any delusion; it did not generally affect his conduct in life or affect at all his conduct in business matters. It was that not uncommon partial insanity which exercises itself most in talk, and talk especially when such talk is roused or encouraged.

Then the man lived for two years after making the will; and, as the testimony of the witness Mrs. Eadie, as well as that of the solicitor who drew it, shews, he had a lively knowledge and memory of the making and contents of his will, yet never altered it or gave any intimation of any desire to alter it, though living with his wife, as I have said, in the intimacy of husband and wife nearly all that time.

And again, the will was made, it is said, when he was away from his home, and so away from any exciting cause of his delusion; and not long before it had spent itself and he was about to return to his home; and, according to the defendant's own testimony, the delusion was, as one might expect, intermittent. As he stated it, "every two or three weeks he would take spells; he would take those spells; and every three weeks or so he would go out for the groceries and buy milk and crackers and eat them in his bedroom."

The will was drawn with care by a competent and careful solicitor, and made without an exhibition of any kind of resentment against his wife or any member of his household.

And again, the will itself bears testimony against the contention that it was made as it is because of the man's insane view that his wife wished and tried to poison him. It seems to be a carefully considered will of a business man attending strictly to the business in hand, to the exclusion of all delusions;

just as he dealt with all his other business affairs. If he really had it in mind that his wife meant to, and would if she could, poison him, it is hardly likely that, sane or insane, he would have left her \$1,000 and one-seventh of his residue, as the reward of a foul murderer or intending murderer of himself. And in the inclusion of his near relations in the benefits of his will he may have been doing only an act of justice, as it seems that he had got the lion's share of his father's property, under his father's will, against the expectations of his brothers, one of whom, in his evidence at the trial, made it pretty plain that he looked upon the benefits I have mentioned as something like a fair restitution only.

I am not convinced that the learned Judge erred in his finding in favour of the will; and that is enough to dispose of this appeal adversely to the appellant; but I may add that I am, upon Mr. Osler's argument alone, almost, if not quite, convinced that the learned Judge was entirely right.

It is said that the findings were based entirely upon the judgment of the Supreme Court of Canada in the case *Skinner v. Farquharson*, 32 S.C.R. 58; that the Surrogate Court Judge deemed that he was bound by the authority of that case to find as he did. But that cannot be. No one knows better than that learned Judge, that which every lawyer knows, that a finding of fact in one case cannot have any binding effect in any other case, except by way of estoppel; that it is impossible that it could; no two cases are precisely alike. What the learned Judge meant, no doubt, was this: that, acting upon the principle applied in the *Farquharson* will case, he was bound to find in favour of the will in this case. That principle, when plainly stated, is no more than this: that, when the provisions of the will itself prove that it was not affected by insane delusions, it must be found that it was not so affected.

The appeal fails. It must be dismissed.

But there is something more that should be said before the case is parted with here.

Unfortunately, the fact that only one of the beneficiaries under the will in question is a party to this cause seems to have been overlooked until the case came here. In these circum-

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stances, no judgment should be pronounced that could prejudicially affect any of the absent beneficiaries. What, then, should be done? Whatever is done must be inconclusive. To send the case back to be prosecuted over again, but regularly, would be the less convenient and satisfactory choice of evils; it is better to deal with it now finally between the parties to it, leaving others concerned, if any of them chooses to do so, to litigate the matter all over again, between themselves, as any one of them may do, if not a party in any way to this cause, by calling upon the executor to prove the will in solemn form, or in any other of the ways open to them: a thing, however, extremely unlikely now, as all except the widow are interested in upholding the will, and she can hardly desire to contest the will, or she would have done so with her son in this action.

If the defendant had sustained his contention here, all that could be done would be to hold the will to be invalid in so far as it concerns him, and admit it to probate with the gifts to him expunged, which would hardly be to his liking, as in an intestacy as to that he would gain nothing, but lose a good deal; so it is in his own interests, if there be no further litigation, that the whole will be admitted to probate.

And in this connection it is important to add that the defendant, who alone complains of the will, and asserts that his just rights were cut down by his father's insanity, must remember that he gets under the will of a mind so poisoned \$1,000 and one-seventh of the residue, but nothing whatever under an earlier will, made when it is admitted his father was quite sane, and the only other will the man is known to have made. It is just as reasonable to say that the man's insane delusion gave his son \$1,000 and one-seventh of the residue, as it is to say that it took away from any one anything that that one would otherwise have received.

Armstrong. I ask for costs of the appeal.

MEREDITH, C.J.C.P.:—The rule of this Court is, costs to the successful party. It is necessary to mention the subject of costs only when an exception to that rule is made.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Negligence—Death of Person Operating Derrick—Negligence of Owner of Derrick—Negligence of Hirer of Derrick and Operator—Findings of Jury—Absence of Contributory Negligence and Voluntary Assumption of Risk—Master and Servant—Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3 (c)—Duty of Hirer to Operator—Failure to Provide Proper Superintendence and Effective System.

The defendant steel company hired from the defendant paper company a derrick and its crew (engineer and fireman) to do work upon the premises of the steel company. In lifting an iron tank of the steel company, the derrick was overturned and fell, killing D., the engineer, who was operating it. The widow of D. brought an action against both companies to recover damages for his death, and the jury at the trial made findings in favour of the plaintiff against both companies:—

Held (GARROW, J.A., dissenting), that there was no basis for the finding of the jury against the paper company, on the ground that it had supplied a machine lacking the proper equipment; *aliter*, if the paper company had been accurately informed as to the work to be done by the derrick, and had undertaken to supply a machine capable of doing it.

But *held* (GARROW, J.A., dissenting), that the steel company, being supplied by the paper company with a machine which might, under certain conditions induced by orders given for its operation, become dangerous in use, because not properly equipped, undertook (through its workmen) an operation in a hazardous way, and gave directions to D. during its progress without any one in charge who was in fact competent to direct and carry it out safely; there was a duty on the part of the steel company so to direct or superintend the operation as to provide for the safety of those engaged in it, and to employ a system which would ensure the workmen, no matter whose servants they were, against injury; there was a breach of that duty; and, the jury having absolved D. from negligence, and there being no finding that he had voluntarily assumed the risk of the work, the steel company was liable.

Judgment of BRITTON, J., affirmed.

Per GARROW and HODGINS, J.J.A.:—D. was not a fellow-servant with the servants of the steel company who were assisting him; he did not become, by what took place, the servant of that company during the operations; the superintendent and foreman of the steel company, who were on the ground when D. was killed, were not in such relation to him that he was bound to conform to their orders, within the meaning of the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3 (c).

PER GARROW, J.A.:—The injury to D. did not, in a proper sense, arise from any defect in the premises of the steel company, nor from any want of care on the part of that defendant; and the finding of the jury against that defendant could not be supported. But the findings of the jury that the paper company was guilty of negligence which caused D.'s death, by not furnishing proper equipment, clamps and ballast, on the deck of the derrick, and that the machine was dangerous in not being properly clamped to the track or blocked under the decking of the derrick, and the deck not being properly ballasted, were supported by the evidence, and were sufficient to found a judgment against the paper company.

ACTION by Mary Dube, widow and administratrix of the estate of Martin P. Dube, deceased, on behalf of herself and children, to recover damages resulting from the death of Dube. The action was brought against two companies, the Algoma Steel

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Corporation Limited and the Lake Superior Paper Company Limited.

The action was tried by BRITTON, J., and a jury at Sault Ste. Marie.

U. McFadden and *E. V. McMillan*, for the plaintiff.

J. E. Irving, for the defendant the Algoma Steel Corporation Limited.

P. T. Rowland, for the defendant the Lake Superior Paper Company Limited.

June 18, 1915. BRITTON, J.:—A travelling derrick owned by the paper company, and usually operated for their own business upon their own premises, was, with its crew—consisting of the deceased Martin P. Dube as engineer and a fireman—hired by the steel corporation to do some work upon the premises of the steel corporation. The work was to be of comparatively short duration, and the steel corporation was to pay \$40 per day for the use of the derrick and these two men. The derrick was handed over and by its engineer and fireman moved from the tracks upon the premises of the paper company to the tracks of the steel corporation.

There is no evidence that the paper company knew the precise work the derrick was to do, beyond this, that it was intended to lift and remove something of the weight of five, six, or seven tons. Neither the engineer nor the fireman knew until actually at work.

While Dube was lifting by the derrick an iron tank of the steel company from one side of the track to replace it upon a flat car on the other side of the track, the derrick was overturned and fell, in its fall instantly killing Dube.

The plaintiff alleges negligence on the part of both defendants and sues both, treating them as jointly liable. The negligence assigned is:—

(1) That the track was unsafe and insecure by reason of absence of proper ballasting and bracing.

(2) In not furnishing Dube with proper and adequate equipment for carrying on his work.

(3) For having a defective system in doing the work as it was being done at the time when Dube was killed.

(4) In failing to employ competent persons to assist Dube in his work.

(5) In failing to have the derrick properly stayed with outriggings.

(6) In failing to have the derrick properly fastened to the rails by clamps or braces.

(7) In using defective plant and in not having proper superintendence.

Particulars were ordered and furnished as to the negligence of each defendant relied upon by the plaintiff.

At the close of the evidence, each defendant moved for the dismissal of the action, and objected to the case going to the jury. I reserved my decision, and submitted questions to the jury. The following are the questions and answers:—

(1) Was the defendant the Lake Superior Paper Company guilty of any negligence which caused the death of Martin P. Dube? A. Yes.

(2) If so, what was that negligence? Answer fully. A. In not furnishing proper equipment, clamps and ballast, in deck of crane.

(3) Was the crane a safe or dangerous machine at the time when used and as used by the defendant the Algoma Steel Corporation? A. Yes.

(4) If dangerous, in what respect was it dangerous? A. In not being properly clamped to track or blocked under decking. Deck of crane not being properly ballasted.

(5) Was the defendant the Algoma Steel Corporation guilty of negligence which caused the death of Martin P. Dube? A. Yes.

(6) If so, what is the negligence you find? Answer fully. A. In not having a proper rigger to superintend the work that had to be done.

(7) Could the deceased Martin P. Dube, by the exercise of reasonable care, have avoided the accident? A. No.

(8) If so, what could the deceased have done? A. Nothing more than he did.

(9) Damages? A. Each company to pay \$1,500 to widow and children, and to be divided as the Judge sees fit. Damages, \$3,000. If both companies are liable, each to pay \$1,500; if only one, that company to pay the \$3,000.

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No question was submitted to the jury as to whose servant Dube was at the time of the accident. The facts were not in dispute. Upon the undisputed evidence it is a question of law.

In the answers of the jury, the answer to the 3rd question is "Yes." That, of course, is ambiguous; on being asked if they meant "dangerous," they answered in the affirmative, but apparently the clerk omitted to take down the answer in that way. No harm, however, can result from that, because the answer to the 4th question shews that the jury clearly found that the machine was dangerous.

I have read with great interest the exhaustive and carefully prepared argument which counsel kindly sent to me in accordance with leave given at the trial; but, as this case was tried by a jury, the only thing for me is to determine whether there is any evidence which should properly have been submitted to the jury; upon which they could reasonably be asked to find negligence, and how, upon the answers to the questions, the judgment should be entered.

The jury said, and that was the only negligence found by them, that the paper company was negligent "in not furnishing proper equipment, clamps and ballast, in deck of crane." The crane was of standard make. So far as appeared, no accident had happened from using it. It was represented by the paper company that it would lift six or seven tons, and that was shewn to be true, as it did lift that weight. The clamps might or might not be with it. There was a place for clamps, and the use of clamps would depend upon its location on the ground and for what weight the crane was to be used. The other equipment mentioned was ballast. The ballast would simply be stone, or some heavy material, upon the deck, ready to be placed on the side opposite to where the crane and its load would swing.

Blocking was not mentioned by the jury, but there was evidence that blocks might be placed under the overhanging edge of the deck of the derrick and upon the ground upon the side over which the crane hung. Such blocks could easily have been found, and are not, in my opinion, any part of what properly could be called "equipment." It is manifest that the danger was in the using of the crane as it was used and under the circumstances

disclosed—not by reason of anything wrong or dangerous in the crane as it stood.

I am of opinion that there was no evidence of negligence on the part of the Lake Superior Paper Company which should have been submitted to the jury.

As to the Algoma Steel Corporation, Mr. Irving's first objection is, that the deceased Martin P. Dube was not a "workman" within the meaning of the Workmen's Compensation for Injuries Act. It was argued that the deceased was not the servant of the steel corporation; that the relation of master and servant did not exist between them. The plaintiff's reply is, that, by reason of sec. 14 of the Act, the defendants not having raised it in their pleadings as a matter of defence, it is not now open to them. The question was not, as I remember, argued at the trial.

No useful purpose would be served by my discussing at length the objections raised. I am of opinion, as I was at the close of the trial, that there was evidence against the steel company that could not properly be withdrawn from the jury. These questions with my charge were submitted to the jury, and upon these findings judgment must be entered against the defendant the Algoma Steel Corporation for \$3,000, with costs, the costs to be only as if that company were sole defendant.

The \$3,000 will be apportioned \$1,250 to the widow and \$1,750 divided equally among the children. If it be necessary to deduct anything for costs between solicitor and client, the minutes may be spoken to and the apportionment varied. The money of the infant children will be paid into Court. The names and ages of all the children to be verified by affidavit filed upon payment in.

The action against the Lake Superior Paper Company will be dismissed, but without costs.

The defendant the Algoma Steel Corporation Limited appealed from the judgment of BRITTON, J., in favour of the plaintiff; and the plaintiff appealed against the judgment in so far as it dismissed the action against the defendant the Lake Superior Paper Company Limited.

October 1 and 4, 1915. The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

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A. W. Anglin, K.C., for the appellant the Algoma Steel Corporation Limited, argued that where there is no loan of a servant, but bailment of an outfit, including the person who operates it, the hirer is under no responsibility to a person who is part of the outfit. He referred to *Moore v. Palmer* (1886), 2 Times L.R. 781; *Perkins v. Stead* (1907), 23 Times L.R. 433; *Donovan v. Laing Wharton and Down Construction Syndicate*, [1893] 1 Q.B. 629; *Cameron v. Nystrom*, [1893] A.C. 308, at p. 312; *Waldock v. Winfield*, [1901] 2 K.B. 596; *Consolidated Plate Glass Co. v. Caston* (1899), 29 S.C.R. 624, 627; *McCartan v. Belfast Harbour Commissioners*, [1911] 2 I.R. 143, where the *Donovan* case is distinguished; *Hyman v. Nye* (1881), 6 Q.B.D. 685.

T. P. Galt, K.C., and E. V. McMillan, for the plaintiff, argued that both defendants were liable. The "rigger" had complete charge of the outfit. They referred to the *Donovan* and *Hyman* cases *supra*; also to *Webster v. Foley* (1892), 21 S.C.R. 580; *Sim v. Dominion Fish Co.* (1901), 2 O.L.R. 69, 76; *Wilmerston v. Lynn and Hamburg S.S. Co.*, [1913] 3 K.B. 931.

W. M. Douglas, K.C., for the respondent the Lake Superior Paper Company Limited, referred to *Rourke v. White Moss Colliery Co.* (1877), 2 C.P.D. 205; *Carter v. Clarke* (1898), 78 L.T.R. 76; Halsbury's Laws of England, vol. 20, p. 140, para. 281.

Anglin, in reply.

January 24, 1916. HODGINS, J.A.:—The facts of this case are fairly clear. The crane and its attendants were hired by the steel company. The jury have found against the paper company, on the ground that it had supplied a machine lacking the proper equipment. But that equipment was only necessary in cases where the crane was used in lifting with a long arm or where the weight was very heavy.

If the paper company had been accurately informed as to the work, and had undertaken to supply a machine capable of doing it, there would be a basis for the finding of the jury.

But the inquiry made and the answer given are not actually connected with the bargain when made, and I have come to the conclusion, with some hesitation, that the paper company cannot be made liable.

The appeal of the plaintiff against the paper company should therefore be dismissed with costs.

In dealing with the steel company's appeal, it must be borne in mind that, while the crane and its crew were hired by it, it was only their work and services that were transferred. It is clear upon the evidence that a craneman, such as Dube was, must have his hands full in working the levers and attending to the brakes, and could not be expected to supervise the outside work. He could have surveyed the situation; and, if he did so, and considered it dangerous to perform the operation, he could have declined to proceed. In that case the steel company could not have dismissed him, nor could they have compelled him to risk his life or limbs, or his master's property, in doing what they wished to be done. All that the steel company's servants did was to notify him what they proposed to move and where to go, to signal him when to raise the boom and swing it and when to lower.

None of these things, as it appears to me, indicate that he had become their servant in the sense that the paper company had parted with all control or that the steel company had for the time become his complete master. Their right to require him to act was always subordinate to his right to refuse to do what he considered dangerous, either to himself, as the paper company's servant, or to the crane as the property of that company. An examination of the cases, and particularly that, in the House of Lords, of *McCartan v. Belfast Harbour Commissioners*, [1911] 2 I.R. 143, leads to the conclusion that he was not a fellow-servant with those of the steel company who were assisting him. The steel company had, it is true, a superintendent on the ground when the accident happened and a foreman, but I cannot find that they were in such relation to him that he was bound to conform to their orders, as that expression is used in the Workmen's Compensation for Injuries Act.*

But I do not think that is decisive of this case. Being supplied by the paper company with a machine which might, under certain conditions induced by orders given for its operation, become

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*R.S.O. 1914, ch. 146, sec. 3: "Where personal injury is caused to a workman by reason of . . . (c) the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed . . . the workman, or, in case the injury results in death, the legal personal representatives . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

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dangerous in use, because not properly equipped, the steel company, through its workmen, undertook an operation in a hazardous way, and gave directions to Dube during its progress without any one in charge who was in fact competent to direct it and carry it out safely. It was the steel company's duty to have so directed or superintended the operation as to provide for the safety of those engaged in it, and to have employed a system which would ensure the workmen, no matter whose servants they were, against injury. The jury have absolved Dube from negligence, and there is no finding that he had voluntarily assumed the risk of the work. The steel company should be held liable.

The steel company's appeal should be dismissed with costs, and the judgment directed to be entered against it for \$3,000 should stand, with costs of action and appeal, including any costs payable by the respondent to the paper company.

MEREDITH, C.J.O.;—I agree with my brother Hodgins that the appeal of the defendant the Algoma Steel Corporation fails and must be dismissed, and that the plaintiff's appeal must also be dismissed.

I express no opinion on the question whether the deceased was, for the purpose of the work in which he was engaged when he met with his death, the servant of the steel company.

MAGEE, J.A.:—I agree.

GARROW, J.A.:—Appeal by the defendant the Algoma Steel Corporation against the judgment, in favour of the plaintiff, of Britton, J., and a jury. There is also a cross-appeal by the plaintiff against the judgment in so far as it dismissed the action against the defendant the Lake Superior Paper Company.

The action was brought by the plaintiff, Mary Dube, to recover damages caused by the death of her husband, Martin P. Dube, through the alleged negligence of the defendants or one of them. The statement of claim alleges generally that the deceased was in the employment of the defendants, and, while so employed, was fatally injured through their negligence.

The acts of negligence alleged are: (1) the track upon which the derrick was standing was insecure and unsafe by reason of the absence of proper ballasting and braces; (2) absence of proper

and adequate tools and equipment for carrying on the work; (3) in employing a defective system of carrying on operations; (4) failing to employ proper and competent persons to assist the deceased; (5) failure to have the derrick properly stayed with outriggings and other braces; (6) failing to have it securely fastened to the track by iron clamps or other apparatus necessary to render the derrick secure; (7) defective condition and arrangement of the ways, works, machinery, plant, and premises of the defendants; (8) negligence of those in superintendence of the deceased in giving orders to have the tank moved by the derrick, inasmuch as the derrick was too light and insecure for that purpose.

The Algoma Steel Corporation pleaded that it had rented the derrick from its co-defendant, with engineer and fireman, at \$40 per day; that the servants of the defendant the Algoma Steel Corporation did not control and had no right to control the deceased in the operation of the derrick; that all they did and all they had the right to do was to designate the materials to be moved and the place where they were to be deposited, and to make the necessary fastenings and unfastenings, leaving the manner and method of the transportation to the deceased; that that defendant had no knowledge of any defect in the derrick, and did not owe a duty to the deceased to inspect for defects or to remedy the same (if any); and charged contributory negligence.

The defendant the Lake Superior Paper Company pleaded that the deceased was in full control and management of the derrick, and not subject to the orders or directions of that defendant; that, if he undertook to lift a load which was too heavy for this machine—which that defendant denied—it was his own fault, that the derrick was quite capable of lifting the load, and its failure to do so was owing to Dube's own negligence in managing it; that at that time he was not in the employment of that defendant; and denied generally and particularly the allegations of negligence.

The evidence discloses that Dube had been an engineer on a railway locomotive, but some six weeks before his injury he had been employed by the defendant the paper company as engineer on the derrick. The defendant the steel company hired the derrick at a *per diem* rental, which included the engineer, Dube, and the fireman, for the purpose of moving certain materials, among which

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was a tank weighing about five tons. The premises of the defendants adjoin. The derrick, with Dube and the fireman in charge, was delivered to the defendant the Algoma Steel Corporation at the boundary, and its officials then took charge and gave directions where to go and what to move; and, as Dube's duty as engineer kept him engaged inside, these officials or some of them also made the attachments to the articles to be lifted, and called out when to raise and when to lower. The tank was the last article intended to be moved, the others having been safely and successfully moved and loaded upon cars as directed by the officials in attendance on behalf of the steel company.

The attachments were made and the operation of moving the tank was commenced, as in the case of the other articles previously moved; the tank had been raised off its base, and was in the stage of being swung round, when the derrick suddenly collapsed and crushed Dube to death.

Several reasons for the collapse are suggested and receive some support from the evidence. It is in evidence that the track, which seems to be an ordinary railway track, had been lifted and shifted to enable the derrick to reach the tank, and that it had been left without ballast; and it is suggested, and there is some evidence, that the tracks had shifted with the strain of the operation by reason of the lack of ballast.

There was also evidence of the absence of clamps and other anchorage appliances to keep the derrick firm while engaged in work, and that it would have been the duty of a "rigger," had one been employed, to see that all such necessary appliances were used; and that a "rigger"—that is, a man with experience in such operations—is a usual and necessary member of a derrick crew engaged in heavy work.

The evidence also shews that, although there was a superintendent (Campbell) and a foreman (Becking) present on behalf of the defendant the Algoma Steel Corporation, neither of these possessed or claimed to possess the experience in such matters of a "rigger."

There was no evidence to indicate that the machine itself was defective, or that it was not capable, under proper management, of moving with safety the tank or even a greater weight.

Motions for a nonsuit were made on behalf of both defendants,

which were reserved, and the case was submitted to the jury in a series of questions, which, with the answers, were as follows—(as set out in the judgment of Britton, J., *supra*).

Afterwards the learned Judge, in a considered judgment, granted the motion of nonsuit as to the paper company, against whom the action was accordingly dismissed, but refused it as to the other defendant, against whom judgment was awarded for \$3,000 and costs.

The ground upon which Britton, J., proceeded in dismissing the action against the paper company was, that the negligence causing the injury was attributable to the mode of using the machine and not to the machine itself. And for the mode of using it he considered the steel company to be alone responsible.

He did not ask the jury to find whose servant Dube was, but told them that, upon the undisputed evidence, he was the servant of the steel company. This was objected to by counsel for the steel company; and, before proceeding with the main question, it may be well to express my opinion upon the objection, which appears to be one of prime importance in the case.

The question of which is master under such circumstances is fundamentally one of fact, as is pointed out in a recent case in the House of Lords, *McCartan v. Belfast Harbour Commissioners*, [1911] 2 I.R. 143, and therefore for the jury when the evidence is conflicting or more than one inference might reasonably be drawn. But, if the evidence is clear and undisputed, and it seems to me to be so in this case, it need not be referred to the jury, but may be determined by the Judge: see *Cahalane v. North Metropolitan R.W. and Canal Co.* (1896), 12 Times L.R. 611. So far I agree with Britton, J.

But, with deference, I find myself quite unable to agree with his conclusion that Dube, who was undoubtedly the servant of the paper company, became by what took place the servant of the other company during the operations which were being carried on by means of the derrick. The facts seem to be practically identical with those in question in *Dewar v. Tasker and Sons Limited* (1907), 23 Times L.R. 259, *Jones v. Corporation of Liverpool* (1885), 14 Q.B.D. 890, and *Moore v. Palmer*, 2 Times L.R. 781 (C.A.), where the reverse was held. See also *Pattison v. Canadian Pacific R. W. Co.* (1912), 26 O.L.R. 410.

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It is, of course, well established that the servant of A. may become the temporary servant of B. See *Union Steamship Co. v. Claridge*, [1894] A.C. 185. An illustration is given in *Perkins v. Stead*, 23 Times L.R. 433. But the circumstances there were widely different from those with which we have to deal in this case. See also, as other illustrations, *Donovan v. Lang Wharton and Down Construction Syndicate*, [1893] 1 Q.B. 629; *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205; and the criticism of these cases by Vaughan Williams, L.J., in *Waldock v. Winfield*, [1901] 2 K.B. 596, at p. 603.

It is not easy to extract out of the very numerous and not always consistent cases on the subject anything which can be called a principle. At least an attempt is made in Halsbury's Laws of England, vol. 20, p. 266, where it is stated that "it must be shewn that the employer was for the time being in the position of his master; that he not merely gave the servant directions as to what work he had to do, but controlled him to the entire exclusion of his master."

The circumstances in evidence do not, I think, point to any such control on the part of the steel company over Dube. What its employees did, and all that they did, was to shew him the articles to be moved, and to attach and adjust to the articles the chains used in the operation.

The action, therefore, as against the steel company, in so far as it depends upon the provisions of the Workmen's Compensation for Injuries Act, in my opinion fails.

Nor am I able to see any safe ground upon which a recovery as for a cause of action apart from the statute could be rested. It is true that Dube was upon the premises by the permission and at the request of the defendant the steel company. But he was there under a contract, using a machine which he had brought with him, which belonged to his master, and with which he was presumably familiar.

The measure of the responsibility of the defendant the steel company was to take reasonable care that the deceased should not be injured by reason of the condition of the defendant's premises. See *Heaven v. Pender* (1883), 11 Q.B.D. 503. That responsibility, however, could not, I think, be extended, under the circumstances, to include the condition or the mode of using the derrick by the

servants of the other defendant. In a word, the injury to Dube did not, in my opinion, in any proper sense arise from any defect in the premises of the defendant the steel company, nor, so far as shewn, from any want of care on the part of that defendant.

As to the other defendant, I am of the opinion that the plaintiff's cross-appeal should be allowed, and the nonsuit set aside, and judgment given against that defendant for the amount at which the damages were assessed by the jury.

The jury found the defendant the paper company guilty of negligence which caused Dube's death, by not furnishing proper equipment, clamps and ballast, on the deck of the derrick, and that the machine was dangerous in not being properly clamped to the track or blocked under the decking of the derrick, and the deck not being properly ballasted. These findings seem to me to be supported by the evidence, and there is in them enough to justify a finding in the plaintiff's favour against the defendant the paper company.

It is true that the jury also found that there should have been the services of a "rigger," but only against the other defendant. That, however, does not, I think, annul nor even reduce the effect of the other very specific findings against the paper company, emphasised as they are by a conversation, not denied, which took place on the morning of the day of the accident, before the machine had been sent over, between Mr. Becking, representing the steel company, and Mr. Kemp, representing the paper company. Mr. Becking had, he says, gone over to the paper company's premises to inquire when the derrick would be sent over. He saw Mr. Kemp, who told him that it would be sent in a little while, that they were just coaling up or taking on some water. Mr. Becking then asked if there were any "clamps or rigging" for the derrick, to which Mr. Kemp replied by asking what was the greatest weight intended to be lifted, and was told "six or seven tons." To this Mr. Kemp replied: "You don't need them; we never use them." The tank was the heaviest weight of all, and it weighed something less than five tons. The failure to supply so much at least of the appliances which the jury found should have been supplied was, therefore, it may be inferred, not accidental but deliberate. And the conversation seems to dispose of the suggestion that the steel company was expected to supply, or that it

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undertook to supply, any part of the equipment necessary for doing the proposed work safely.

Something should perhaps be said about the conduct of Dube himself. Why, it may not unreasonably be asked, did he undertake the lifting of the tank with such imperfect appliances? Was he not, by doing so, the author of his own injury? The jury, however, have absolved him from all contributory negligence. He had had, it is true, some weeks' experience as engineer of the derrick. But there is no evidence that he had had in the course of his experience to lift a weight as great as the tank. As to lighter weights, the experience of that day alone shewed that the machine, as equipped, was quite sufficient for such weights, while it proved insufficient for the heavier weight which brought about the catastrophe. Should the risk of what occurred rest upon him, or should it not rather be imputed—as I think it should—to his employer, who sent him forth, with just such equipment as he had, to do exactly the work which he was engaged in doing, and doing without negligence on his part, as the jury has found? And, if it was intended to contend that he had assumed the risk, the jury should have been asked to pass upon the question.

The appeal should, I think, for these reasons be allowed, the action dismissed as against the steel company, and judgment given in favour of the plaintiff against the paper company for the damages assessed by the jury.

As to costs, the proper order seems to me to be that the plaintiff should pay the costs of the action and of the appeal by the steel company, and that the paper company should pay the plaintiff's costs of the action and the appeal, including the cross-appeal, as if that company alone had been sued.

MACLAREN, J.A.:—I agree.

*Judgment as stated by HODGINS, J.A.; GARROW and
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[APPELLATE DIVISION.]

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Will—Legacies — Insufficiency of Assets to Pay all in Full—Legacy to Creditor in Satisfaction of Debt but of Larger Amount than Debt—Abatement with other Legacies.

The principle by which a legacy given in satisfaction of dower is entitled to priority, and does not abate upon a deficiency of assets, is inapplicable to the case of a legacy given in satisfaction of an ascertained debt.

Where a testator bequeathed to his physician the sum of \$1,500 "in full settlement for his services during the past five years," and it appeared that the amount due for these services was only \$300, and that there was a deficiency of assets to pay all the legacies, it was *held*, that the legacy to the physician must abate *pari passu* with the other legacies.

The suggestion that the physician should be paid the full amount of his demand as a creditor, and share *pro rata* for the balance, was not adopted.

In re Wedmore, [1907] 2 Ch. 277, approved and followed.

Judgment of MIDDLETON, J., reversing the judgment of the Judge of the Surrogate Court of the County of Middlesex, affirmed.

APPEAL by Charles Roe from an order of the Judge of the Surrogate Court of the County of Middlesex, made upon the passing of the accounts of the executors of one Rispin, deceased, allowing a payment of \$1,500 made by the executors to Dr. Tisdall, a legatee.

Reasons for the order of the Surrogate Court Judge were given in writing as follows:—

March 31, 1914. MACBETH, Surr. Ct.J.:—In Williams on Executors, 10th ed., p. 1093, I find this passage: "The general rule is, that, among legacies in their nature general . . . there is no preference of payment: they all abate together, and proportionately, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as when a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties; and it would seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee. But it is requisite that the right or interest should be subsisting at the testator's death."

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And in Theobald on Wills, 6th ed., p. 810: "As between general legatees, legacies given for valuable consideration, as for debts or instead of dower, have priority."

The same general rule is to be found in White & Tudor's Leading Cases, 6th ed., vol. 2, p. 302; in Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 48; in 40 Cyc. 1906; in Encyc. of Laws of Eng., edited by Renton (1897), vol. 1, p. 17; and in Roper on Legacies, vol. 1, p. 432.

And the same rule was adopted in the United States. From many decisions, I cite a few from the Courts of States which have followed most closely English rule and precedent, viz.: *Duncan v. Inhabitants of Franklin* (1887), 10 Atl. Repr. 546 (N.J.); *Reynolds v. Reynolds* (1906), 63 Atl. Repr. 804 (R.I.); *Matthews v. Targarona* (1906), 65 Atl. Repr. 60 (Md.)

These are all cases of legacies to creditors.

But in Theobald on Wills, 7th ed. (1908), p. 846, there is a change in the rule: it is stated that "a legacy given instead of dower has priority;" "A legacy given to satisfy a debt has no priority, if the creditor elects to take it instead of the debt."

This change was the result of the decision of Mr. Justice Kekewich in *In re Wedmore*, [1907] 2 Ch. 277.

Speaking of this case in the English Law Journal, vol. 42, p. 390, the editor, after citing the rule as stated in Williams and in the 6th ed. of Theobald, proceeds as follows: "None of the cases cited in either of these well-known text-books quite bear out the propositions above quoted; and in the light of a recent case before Mr. Justice Kekewich it may be doubted whether they are not too broadly stated. The case we refer to is *In re Wedmore*, in which a testator had bequeathed to the trustees of his daughter's marriage settlement a legacy of £3,000 in satisfaction of a covenant by him contained in the settlement to pay a sum of £1,000. . . . The precise amount of both debt and legacy being ascertained, the case was not on all-fours with that of an interest like dower, the value of which is not always ascertained or ascertainable. In the old case of *Davies v. Bush*, . . . a testator gave a legacy on condition that the legatee executed a release of all claims which he had on the testator; and Lord Lyndhurst considered that, if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the

legacy so as to avoid abatement. But the actual decision did not go to the length that a legacy given in satisfaction of a debt would not abate, and Mr. Justice Kekewich's judgment appears now to have disposed of this *casus omissus*."

Let us now consider this judgment. The learned Judge begins by saying: "This is a novel point in this sense, that no one has produced an authority which really bears directly upon it." He then cites the general rule from the last edition of Williams, the 6th edition of Theobald, and the 7th edition of White & Tudor's Leading Cases, as I have quoted them above, and proceeds: "With the assistance of counsel I have referred to all the cases which the learned editors have cited, and not one of them decides the question as regards legacies given in satisfaction of debts. They do decide, and it must be taken to be established, that a legacy given to a widow in satisfaction of dower does not abate. But there is no case which really touches the question of debt. The only one which is reasonably near the point is *Davies v. Bush*, to which I shall presently refer."

The learned Judge then discusses, at some length, the principle, if any, on which a legacy instead of dower is given priority, and continues: "Is there any reason for extending the rule to the case of debts? I have already referred to the case of *Davies v. Bush* (Younge 341) as the only one that purports to extend it, but when you look into that decision it does not go so far. Lord Lyndhurst does not decide the point, and he expresses the opinion in language which entirely relieves me from treating it as a binding authority here. There the legacy was given in release of a right of account. . . and the Court was satisfied that it was not worth while taking the account because nothing was due to the legatee; . . . and the Lord Chief Baron says: 'If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee cannot be treated as a purchaser.' That is exactly on the same lines as the decision of Chitty, J., in *In re Greenwood*, [1892] 2 Ch. 295. And he goes on, 'If any debt were really due, then I am inclined to think that the present comes within the principle of those cases which have been cited.' He does not decide that it was; he only expresses an indication of his opinion. How can I bring a case of this kind within the rule? This is a legacy in satisfaction of an ascertained debt. There is

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no doubt that in one sense the legatee may be considered as a purchaser. If he elects to take under the will, he gives up the debt and takes the legacy, but still it is not at all like the case of a legatee taking a legacy in lieu of a right of dower in land. We know precisely what the debt was—it was £1,000. We also know precisely what the legacy was—it was £3,000, payable to the same persons; but it seems to my mind impossible to apply to that state of circumstances the considerations which apply to a case of dower. The legatee elects to take the larger sum and gives up the debt, and in taking the larger sum the legatee takes it by way of bounty. . . . I cannot see myself how legacies accepted in that way differ in any way from other general legacies which are mere bounties.”

There can be no doubt, I think, that if this case be a binding authority, then the law is as stated in the last edition of Theobald: “A legacy given to satisfy a debt has no priority.” But there are several points which are to be considered. In the first place, it might be said, with great respect, that Kekewich, J., has not given sufficient weight to Lord Lyndhurst’s opinion in *Davies v. Bush* (1831), Younge 341. The judgment in that case is very short. The only point in the case was whether the legacy in question should abate ratably with other legacies. The Lord Chief Baron answers that question in the affirmative, if there was not a debt actually due to the legatee and it was clear that no such indebtedness could be shewn. Then he says that, if any debt were really due, he thought the principle of the cases cited (which were all cases of legacies in lieu of dower) would apply. Surely this is something more than a mere *dictum*, and is some authority for the *consensus* of text-books and encyclopædias that a legatee who gives up a valid claim on his testator’s estate as a condition of receiving his legacy, is not a mere volunteer or recipient of the testator’s bounty. And it may be noted that in *In re Whitehead* (1913), 82 L.J.Ch. 302, Farwell, L.J., seems to attach more weight to *Davies v. Bush*. In the second place, there is the circumstance, to me of great importance, that, in the *Wedmore* case, the opinion of that eminent lawyer, the present Master of the Rolls, in *In re Lawley*, [1902] 2 Ch. 799, 807, was not brought to the attention of Kekewich, J.

In re Lawley was a peculiar case: the testator, F.C.L., under

his mother's will, had a general power of appointment over £10,000 which, in default of appointment, fell into her residuary estate. F.C.L. (as the head-note states) borrowed a sum of money, and, as security for the loan, covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund, and that he would not revoke the will. He made a will accordingly and died. *Held*, that the covenant was ineffectual to bind the fund, and that, notwithstanding that the will was made in pursuance of the covenant, the lender was a volunteer as against the testator's general creditors, and therefore took subject to the rule that the exercise by will of a general power of appointment makes the property which is the subject of the power assets for the payment of the debts of the appointor; consequently, the lender was not entitled to priority, as regards the fund, over the other creditors." Cozens-Hardy, then Lord Justice, said, after stating the law as above (p. 807): "The executors here were entitled to recover and have received the appointed fund. The question then arises, What are they to do with it? As a matter of construction this is a demonstrative legacy, and as such it is subject to the payment of the testator's debts. It is said, however, that this is not so, because the will was made in pursuance of a covenant in the mortgage and was not a voluntary transaction. But the applicants take nothing under the mortgage—they take solely under the will. The doctrine of specific performance has no application to a case like the present. The testator covenanted that he would give a legacy, and he has given a legacy. Such a legacy must be taken with all its incidents. There are some legacies which have priority over other legacies, such as legacies to a widow in satisfaction of her dower, or to a creditor in satisfaction of a debt. But it has never been held that such a preferential legacy can be paid until after all debts are satisfied. A somewhat analogous point arose in the case of *Davies v. Bush*." His Lordship then quoted from Lord Lyndhurst's judgment, and continued: "It has never, so far as I know, been suggested that a preferential legatee, even though the legatee be considered as a purchaser, is entitled to payment until after the debts are satisfied."

I have already referred to the judgment of Farwell, L.J., in *In re Whitehead*, 82 L.J. Ch. 302, 108 L.T. 368. In that case the learned Judge, after commenting on *Blower v. Morret* (1752),

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2 Ves. Sen. 420 (a case of dower), and *Davies v. Bush* (*supra*), proceeds as follows: "Then . . . comes the case . . . of *In re Wedmore* . . . which I confess I find very difficult to understand." The learned Judge read an extract from the judgment of Kekewich, J., and continued: "Whether that is right or wrong I am not concerned to consider. The case I have is a case in which what the legatee is invited to release is not any part of the testator's estate, real or personal. It is a sum which was settled for the benefit of a third person; and none of the cases I have seen bears any similarity to a case of that sort." He continues: "It is almost impossible to find a principle underlying a settled rule like this which has gone on for nearly two centuries without any intelligible principle being stated. The main underlying idea seems to be the moral claim of the widow; no doubt there is such a moral claim, but that is not a basis on which Courts nowadays seek to administer legal or equitable rights. Sitting as a Judge of first instance, I have to take the cases as I find them. I do not feel at liberty to try and add to what is so far settled law with regard to dower and unsettled with regard to other claims, but all dealing with the testator's own estate, so that other legatees are to be postponed in order that the particular legatee may get some advantage. I know of no case in which the principle has ever been applied to such a case as this, where the advantage is given to a third person and not to the testator's estate at all. I do not feel that I ought to try to extend what is to me a not very intelligible principle to a new case. The result is that I must answer the question by saying that the legacy is not entitled to priority."

In this case, too, it may be remarked that the judgment of Cozens-Hardy, L.J., in *In re Lawley* (*supra*), was not cited.

The actual point for decision by Farwell, L.J., as I have said, was settled more than 100 years before by the judgment in *Shirt v. Westby*, 16 Ves. 393, in which it was held that a general legacy given in settlement of the legatee's claim against a third party must abate with other general legacies on a deficiency of assets. This decision has never been questioned, so far as I am aware, in England, though the opposite view has been taken in some of the Courts of the United States: see, e.g., *Henry's Estate* (1898), 20 Pa. Co. Ct. R. 415. So that it does not seem to have been

necessary for his decision that Farwell, L.J., should discuss *Davies v. Bush* and *In re Wedmore*. To the last-mentioned case the learned Lord Justice gives little, if any, support: he finds it very difficult to understand, and is not concerned to consider whether it is right or wrong, though the result of it is that a rule of law, supposed to have been settled 80 years before by Lord Lyndhurst, is now unsettled. He certainly does not accept the judgment of Kekewich, J., as settling the law: and this is the view taken in Halsbury's Laws of England, vol. 14, p. 276, where it is said to be doubtful whether a legacy to a creditor in settlement of his debt must abate with other general legacies on a deficiency of assets.

With much respect, I confess that I cannot understand the judgment of Kekewich, J. A legacy to a widow for her dower is to be preferred: presumably because the value of the dower is not ascertained or readily ascertainable. But a legacy of £3,000 in satisfaction of an ascertained debt must abate. Why?

Does the answer to the question whether or not a legacy to a creditor should abate with other legacies depend upon whether the creditor's claim was or was not ascertained?

In the case before me the testator owed the legatee, Dr. Tisdall, about \$300 at the date of the will, and it was still owing when he died. The testator did not know how much he owed, as Dr. Tisdall had never sent in his bill, but the amount could have been then readily ascertained from the doctor's books. He left Dr. Tisdall \$1,500. Can it be said that, if the testator had Dr. Tisdall's bill before he made his will, Dr. Tisdall's legacy would have to abate, but, as the testator did not know how much he owed, Dr. Tisdall's legacy must be preferred?

Suppose a different case. Suppose a legacy in satisfaction of the testator's indirect liability as guarantor or surety to the legatee. Can it be argued that this legacy would be preferred, no matter how remote the liability from which the testator desired a release, while a legacy of £3,000 to settle a debt of £1,000 must abate? I cannot see upon what principle any such distinction can be drawn.

In my humble opinion, it is perhaps a pity that the Courts permitted any exception to the law that general legacies should share *pro ratâ*. If the legatees elect to take under the will, why

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should they not all share alike? What should be sufficient evidence that the testator did not so intend?

A testator leaves a large legacy to his second wife, which is to be in lieu of dower rights of trifling value; he leaves other legacies to his daughters by his first marriage. Why should it be assumed, on a deficiency of assets, that the testator intended the first legacy to be paid in full, though his daughters should get nothing?

In the case before me, the testator left \$5,000 to his only living relative and \$1,500 to settle his doctor's bill. In the result, the doctor, if preferred, will get nearly as much from the testator's bounty as the testator's nephew. Should it be assumed that such was the testator's intention?

But the rule and the reason on which it is rested are, I think, settled beyond dispute by the authorities.

In *Koch v. Heisey* (1894), 26 O.R. 87, Sir William Meredith, C.J., said (p. 89): "The widow is, I think, entitled to be paid her annuity in priority to the other legatees. Being given to her in lieu of dower she does not stand in the position of a volunteer, and the annuity is therefore entitled to a preference of payment over the other legacies given by the will." And the learned Chief Justice refers to the passage in *Williams on Executors* which I have cited above, and to *In re Greenwood*, [1892] 2 Ch. 295, in which case Chitty, J., said, after consideration of the authorities, that a widow is a purchaser of a legacy in lieu of dower, if she have any dower.

And on this principle it seems to me that a legatee who surrenders any valid claim upon the estate as the consideration for his legacy must be considered a purchaser. This is clearly recognised by Mowat, V.-C., in *Anderson v. Dougall* (1868), 15 Gr. 405, where that learned Judge said: "The general rule is, that in a case of a deficiency of assets, legacies for which there is some valuable consideration are entitled to a preference of payment over those which are mere bounties."

In England, a legacy to an executor for his trouble must abate with other legacies on a deficiency of assets: *Duncan v. Watts* (1852), 16 Beav. 204; for the law does not allow any remuneration for an executor's services. But in this country the executor has by statute the right to reasonable remuneration for his care, pains, etc.; and, if a testator bequeath a legacy to his executor for

his services, the executor, if he accepts the legacy, must abandon his claim to compensation under the statute: *Williams v. Roy* (1885), 9 O.R. 534.

In *Anderson v. Dougall*, legacies to executors for their services were held to be entitled to a preference of payment over other legacies, for the reason assigned in the passage cited from the Vice-Chancellor's judgment, namely, that the relinquishment by the executors of their statutory right of remuneration was a valuable consideration for the legacies. This was approved by the present Chancellor in *Boys' Home of Hamilton v. Lewis* (1883), 4 O.R. 18, 26: "In the case of a legacy to executors expressly for their trouble, it is decided that if there is a deficiency of assets it does abate with the other legacies: *Anderson v. Dougall*, 15 Gr. 407."

I am unable to draw any distinction between the executor-legatee who gives up his statutory right of remuneration and the creditor-legatee who gives up his subsisting claim against the estate. In my opinion, the one is just as much a purchaser of his legacy as the other.

I would, therefore, follow the general rule as laid down in the 10th edition of William on Executors, which is set out in the beginning of this judgment, as it seems to me to be supported by the weight of authority in England, and accepted beyond doubt in the cases which I have cited from our own reports.

My conclusion is that Dr. Tisdall's legacy does not abate with the others.

The appeal from the order of the Surrogate Court Judge was heard by MIDDLETON, J., in the Weekly Court at London.

T. G. Meredith, K.C., for the appellant.

W. R. Meredith, for the executors.

U. A. Buchner, for Dr. Tisdall, the legatee.

June 30, 1914. MIDDLETON, J.:—This motion is an appeal from the determination of the Surrogate Court Judge with reference to a payment of a legacy of \$1,500, made by the executors to Dr. Tisdall. Some question was raised as to the jurisdiction of the Surrogate Court Judge to deal with this question upon an audit. To avoid doubt, it was agreed by all parties that this

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motion should be treated, not merely as an appeal from the order of the learned Surrogate Court Judge, but also as a motion, as upon originating notice, to determine the question now arising.

By his will the testator gave a number of pecuniary legacies, including among others a legacy of \$1,500 to Dr. Tisdall, who had been attending him during his last illness. This legacy was to be taken in satisfaction of the doctor's bill against the testator. This bill at the time of the decease would amount to about \$300. The question is, whether the fact that Dr. Tisdall was a creditor, and that the legacy was to be accepted by him in satisfaction of his claim, gives him priority over the other legatees. The estate has not turned out as well as contemplated by the deceased, and the general pecuniary legatees will not receive more than 50 cents on the dollar.

The precise point is determined in favour of the abatement by the decision in *In re Wedmore*, [1907] 2 Ch. 277, where it was determined that the principle by which a legacy given in satisfaction of dower was entitled to priority, and did not abate, was inapplicable to the case of a legacy given in satisfaction of an ascertained debt. The learned Surrogate Court Judge has declined to follow this decision, deeming it to be in conflict with the principles enunciated in a number of earlier cases.

No doubt, there are *dicta* looking the other way; but this is the only decision upon the precise question; and I think the safer course is to follow this decision, so long as it is not overruled by some Court of higher authority. In the last edition of Theobald, the case is accepted without question, and the statement, appearing in the earlier editions of that work, which favours the view entertained by the learned Surrogate Court Judge, has been modified so as to accord with the decision.

With all respect to those who entertain the contrary view, the decision in question commends itself to me. The law by which a legacy to a widow in lieu of dower is entitled to priority is now too well settled to admit of question. It is in truth based upon the doctrine of election. The testator, desiring to dispose of property which is not his, namely, his wife's dower interest, in effect offers her a price which he is willing to pay for it. Before those claiming under the testator can take a benefit under his will which deals with this property sought to be purchased from the widow, they must pay the price.

This has no application whatever to the case of a creditor. The testator is not purchasing anything from him; and, although his failure to rank as a creditor may benefit the legatees, it cannot be said that any assets pass from him to the testator or his estate. He takes the legacy by the bounty of the testator. The testator has chosen to limit his bounty by directing that it is conditional upon the creditor waiving his claim as creditor. The bounty is so much the less, because part of the money received in truth represents a debt. The creditor should have the right, and no doubt has the right, to decline to receive the legacy upon these terms. He could then assert his claim, but I can conceive no foundation for the statement that because a debt, which may be trivial in amount, has to be forgiven as a condition of the receipt of the legacy, the legatee, therefore, acquires priority.

The testator's bounty is limited by the inadequacy of his estate, so all the beneficiaries should abate.

If the intention of the testator is to be sought, it is inconceivable that this would justify the contention of the legatee. If the testator had realised that his estate might not be sufficient to pay all, is it likely that he would intend his doctor, whose bill was only \$300, to receive the \$1,500 in full, at the expense of the near relatives, whose legacies would have to abate?

For these reasons, I think the appeal should be allowed, and that an order should now be made, on the originating notice, declaring that the legacy to Dr. Tisdall abates *pari passu* with the other legacies.

The costs will come out of the estate.

Dr. Tisdall appealed from the order of MIDDLETON, J.

December 14, 1914. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

Buchner, for the appellant.

T. G. Meredith, K.C., for Charles Roe, the respondent.

J. Macpherson, for the executors.

The authorities cited are all referred to in the reasons for judgment of the learned Surrogate Court Judge.

December 24, 1914. The judgment of the Court was delivered by RIDDELL, J.:—The late Luke Rispin by his will bequeathed his property to a number of beneficiaries. One clause of

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his will reads: "To my physician W. J. Tisdall the sum of fifteen hundred dollars in full settlement for his services during the past five years."

There is a deficiency of assets to pay all the legacies; Dr. Tisdall's bill is only \$300; His Honour Judge Macbeth held that this legacy did not abate; Mr. Justice Middleton held the reverse; and this is an appeal from the decision of Mr. Justice Middleton.

A careful perusal of all the cases cited in the judgments and the arguments convinces me that the only case of authority in our Courts, which is a decision on the point, is *In re Wedmore*, [1907] 2 Ch. 277. There are many *dicta* and text-writers' statements, but no other decision; and I think it should be followed.

It was suggested that possibly the right decision would be to allow the appellant the amount of his bill in full and let him share *pro ratâ* for the balance; but that course is negatived in the case cited.

The appeal should be dismissed; but, in view of the difference of judicial opinion, of the long line of *dicta*, and of the difficulty having been occasioned by the testator himself, I would give costs of all parties out of the estate.

Appeal dismissed.

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[APPELLATE DIVISION.]

Jan. 10.

OLDRIEVE v. C. G. ANDERSON CO. LIMITED.

Sale of Goods—Lumber in Esse at Time of Contract—Inspection — Acceptance — Deduction for Excess of Inferior Grade— Caveat Emptor—Condition— Election—Breach of Warranty.

The plaintiff had a quantity of lumber, of various grades, manufactured and piled at D. station; the defendant company agreed to buy the pile at a price named, subject to "national inspection," delivery to be f.o.b. at D. The lumber was inspected there, loaded on cars, and shipped to a sub-purchaser, who was represented at the inspection. In an action to recover a balance of the price, the defendant company set up that some 9,920 ft. more of No. 1 common was in the quantity accepted and shipped than, under the terms of the agreement, the defendant was obliged to take, and claimed a reduction:—

Held (HOBGINS, J.A., *dissenting*), that this contention was concluded by the inspection and delivery at D.; the goods were *in esse* from the beginning of the negotiations; and the rule *caveat emptor* applied to exclude implied warranties. The inspection, followed by the acceptance and shipment, settled all other questions, both of quantity and quality.

Jones v. Just (1868), L.R. 3 Q.B. 197, 202, and *Towers v. Dominion Iron and Metal Co.* (1885), 11 A.R. 315, followed.

Per HODGINS, J.A.:—The defendant company voluntarily precluded itself from the remedy of rejection, or elected to treat the breach of condition as a breach of warranty; and, having done so, could not reject, and was entitled to sue for damages as for a breach of warranty: *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394.

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APPEAL by the defendant company from the judgment of the Junior Judge of the County Court of the County of Elgin, in favour of the plaintiff, in an action brought in that Court to recover a balance of the price of lumber sold to the defendant company.

November 10, 1915. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

S. H. Bradford, K.C., for the appellant company. The trial Judge erred in his interpretation of the contract, having construed it to mean that the only description of the lumber in question was that it should not exceed $7\frac{1}{2}$ per cent. No. 2 common, and all above No. 2 common conformed to the description. The proper construction of the contract is that the $7\frac{1}{2}$ per cent. of No. 2 common was permissible, and of the balance there should be at least 80 per cent. firsts and seconds and 20 per cent. No. 1 common. The lumber did not comply with the description in the contract, and the appellant company is entitled to recover for breach of warranty as to quality. The delivery of the lumber to the appellant company affected only its right to rescission; it did not affect its right to recover damages for breach of warranty. The evidence shews that the appellant was not aware of the quantity of lumber which did not conform to the description; and, in any event, the respondent did nothing to preclude the right of action for breach of warranty.

A. A. Ingram, for the plaintiff, respondent. The interpretation of the contract given by the trial Judge is correct, and the respondent conformed thereto. The appellant company is estopped from objecting to the quality of the lumber, having regard to the fact that the manager was present and accepted the lumber when loaded on the cars for the purchaser from the appellant company.

January 10, 1916. GARROW, J.A.:—Appeal by the defendant from the judgment in favour of the plaintiff at the trial before the Junior Judge of the County Court of the County of Elgin.

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The plaintiff had a quantity of white ash lumber manufactured and piled at Dutton station for sale, and the defendant entered into negotiations with the plaintiff for its purchase.

One Schriner, a buyer for the defendant, came to Dutton and saw the pile, and made some, but not a complete, examination of it.

The plaintiff's price was \$45 per thousand ft. Schriner informed the plaintiff that the defendant would only purchase subject to what is called "national inspection," a term well understood in the lumbering trade. To this the plaintiff at the time objected, and they parted without making a bargain.

Negotiations were subsequently renewed, and in the end the plaintiff agreed to accept national inspection. Then the defendant's manager, Mr. Charles G. Anderson, and a Mr. Inglis, acting for the Fisher Car Body Company of Detroit, to whom the lumber in question had been resold by the defendant, came to Dutton, met the plaintiff there, and the lumber was inspected, loaded on cars, and shipped, apparently to Detroit.

The defendant now contends that some 9,920 ft. more of No. 1 lumber was in the quantity inspected and shipped than, under the terms of the agreement, the defendant was obliged to take, for which the defendant claims a reduction at the rate of \$20 per thousand. The defendant also contends that a cash allowance of 2 per cent. is customary and should have been allowed. The learned Judge held in favour of the plaintiff on both contentions, and I agree with his conclusions.

The first contention is, I think, concluded by the inspection and delivery at Dutton. The goods were *in esse* from the beginning of the negotiations—not goods to be manufactured. The rule *caveat emptor* therefore applied to exclude implied warranties. See *Jones v. Just* (1868), L.R. 3 Q.B. 197, at p. 202. And the inspection, followed by the acceptance and shipment away, settled all other questions, both of quantity and quality, in my opinion. See *Towers v. Dominion Iron and Metal Co.* (1885), 11 A.R. 315.

I am unable to see any evidence in the case sufficient to justify a holding that the defendant is entitled to the 2 per cent. trade discount which is claimed.

The appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, C.J.O.:—I agree with the conclusion of my brother Garrow that the appeal fails and must be dismissed.

I should have agreed with my brother Hodgins if I were able to take the same view of the facts as he has adopted.

In my opinion, the proper conclusion upon the evidence is that, when the appellant took delivery of the lumber at Dutton, it accepted it as answering its contract with the respondent.

It would, I think, be most unjust, after what took place at Dutton, to permit the appellant to take the position in which my brother Hodgins puts it, of having taken delivery, reserving or retaining the right to claim to recover for breach of the respondent's warranty as to the quantity of No. 2 common.

HODGINS, J.A.:—The lumber which was the subject of the contract in this case was piled in the respondent's yard at Dutton. It was quoted by letter in this way: "White ash; 28,000 ft. 12/4 1st and 2nds carrying 20% No. 1 common \$45.00 per M. These prices are all f.o.b. cars Dutton; inspection at shipping point."

When the white ash was loaded on the 9th February, 1915, the amount shipped ran to 23,216 ft., and there was left on the ground 1,741 ft. of No. 2 common, making in all 24,957 ft. The balance, 3,000 ft., was not taken, as appears by a letter from the respondent to the appellant written on the same day as the shipment.

The delivery was to be f.o.b. Dutton, and, the appellant having resold the lumber, it was loaded on two cars in presence of the parties hereto and of the representative of the sub-purchaser. The course adopted was to load the cars, both the respondent and the sub-purchaser keeping a tally of each board as the loading progressed, and when it was completed the tallies were compared and that of the sub-purchaser accepted. The cars were then billed out. The delivery into the hands of the sub-purchaser, coincident with the measurement, would effectually vest the property in the two car-loads in the appellant, and prevent it, if it would, from rejecting it. But, if not, it had the right, I think, to elect to accept the goods and treat the breach of the condition that the lumber would contain 80% of 1sts and 2nds and 20% of No. 1 common and was fully as good as another named

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car, and would have only (what amounted to) $7\frac{1}{2}$ per cent. of No. 2 common, as a breach of warranty.

[After discussing the evidence as to the tallies, the learned Judge proceeded:]

The only claim made by the respondent when the tally was complete was that the appellant should take the No. 2 common which had been thrown out and not loaded. It seems to me to be impossible, fairly, on this evidence, to put the appellant in the position of having accepted the lumber, with all its faults, as complying with the contract. It is not a question of knowing that No. 1 common was there; that was part of the bargain; but it is a question of knowing that more than 20 per cent. had been loaded. And, while there was ample opportunity, knowledge is not established. But this discussion is really, in my judgment, unimportant. The sale was, by description, "1sts and 2nds carrying 20 per cent. No. 1 common," and by the letter of the 30th January, 1915, the additional description is given, "carrying the same percentage of No. 2 common" as in the previous car referred to in that letter, i.e., about $7\frac{1}{2}$ per cent.

The appellant had resold the two cars under a somewhat similar description, i.e., 1sts and 2nds and No. 1 common, but carrying different prices. If the proper conclusion is that the appellant voluntarily or knowingly, by reason of compulsion caused by its having resold, accepted the lumber with an excess of No. 1 common, though without realising the amount of that excess, I think the legal result is the same as if the appellant was unaware of it. This seems to have been the view of the Court of King's Bench in 1829: *Poulton v. Lattimore* (1829), 9 B. & C. 259.

The Sale of Goods Act, 1893, though not in force here, by sec. 11, 13, and 53, defines the right of a purchaser under either of these circumstances. He may, where there is a condition precedent either by reason of description or otherwise (sec. 13), either reject altogether and sue for breach of condition, or he may elect to accept and treat the conditions as a breach of warranty (sec. 11). In the case of *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, all the learned Judges in the Court of Appeal treat the effect of the cases decided before that Act as enunciating the same rules as were thereby codified. The

purchasers in that case, where the description was "common English sanfoin," had accepted and resold the seed, which turned out to be giant sanfoin. It was shewn that inspection would not have enabled them to distinguish between the two kinds. But no distinction is drawn between acceptance without ability to distinguish, and voluntary acceptance with knowledge. It is the acceptance and enjoyment that are important. Section 11 of the Sale of Goods Act uses the words "and the buyer has accepted the goods, or part thereof . . . the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods." The learned Judges differed as to the effect of a clause in the contract providing that "sellers give no warranty express or implied as to . . . description." The majority of the Court held that the condition itself had become a mere warranty, and that the clause just quoted prevented recovery upon that warranty. Fletcher Moulton, L.J., thought that it was only the remedy which was affected by sec. 11, and that the condition remained a condition and did not become a warranty, and was not barred by the provision that the sellers gave no warranty. Consequently, in his opinion, the purchaser could recover for breach of the condition, as the breach was by the Act treated as a breach of warranty carrying the right to sue for damages and not the right to repudiate. He points out (p. 1015) that where there is a condition the purchaser may elect to take the higher remedy of rejection "if he has not voluntarily or by conduct precluded himself from doing so."

In the House of Lords, [1911] A.C. 394, while the Lord Chancellor deals with the particular case as one of acceptance in the belief that the article was in accordance with the contract, he and the other Law Lords accept in full the judgment of Fletcher Moulton, L.J., in the Court below. Lord Alverstone, C.J., refers to sec. 53 of the Sale of Goods Act, the words of which are: "Where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods."

This case, to my mind, completely covers the present case in principle. The appellant here "voluntarily" precluded itself from the remedy of rejection—in the words of Fletcher Moulton,

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L.J.—or, in the words of the Act, “elected” to treat the breach of condition as a breach of warranty; and, having done so, could not reject, and is entitled to sue for damages as for a breach of warranty.

As I have pointed out, the appellant is not shewn to have been aware of the amount or proportion of the excess, though I think it may fairly be said to have known that there was excess. It had resold, and the delivery to it was by placing the lumber on cars. Until the loading was complete, the quantity and quality or the proportions of the latter could not be ascertained in fact. Upon complete delivery on the cars, and then alone, could the appellant have ascertained the proportions and known whether the contract had been observed. It would be rather a hard position in which to put a purchaser who had resold, to say that he must then and there reject and lose his resale.

The respondent knew but did not disclose the true state of affairs, and he cannot complain if the law requires him to fulfil his contract.

[The learned Judge then dealt with two matters in dispute upon the evidence, but unimportant except to the parties.]

Appeal dismissed: HODGINS, J.A., dissenting.

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[APPELLATE DIVISION.]

WADE v. CRANE.

Contract—Sale of Brick-yard to Company—Default in Payment—Repossession by Vendor—Retention of Bricks of Company—Liability of Vendor for Value—Right to New Machines on Premises—Debentures of Company Transferred in Part Payment of Price—Right of Vendor to Seize Chattels—Winding-up of Company—Claim upon Debentures—Promissory Notes Given for Price of Machine—Right to Sue upon, while Retaining Machine—Set-off—Mutual Debts—Judicature Act, sec. 126—Winding-up Act, sec. 71.

The defendant sold to a brick company his land used as a brick-yard and his brick-making plant, at a price payable partly in cash, partly by the transfer of debentures of the company, and partly by deferred instalments of money. The purchaser agreed, while in possession, to operate the plant so as not to impair its value or that of the lands connected therewith. Another term was that, upon default in payment of any of the instalments, the purchaser's right under the contract should cease, and the defendant as vendor might re-enter. The cash was paid and the debentures transferred, but the company made default

in payment of the first deferred instalment, whereupon the defendant took possession of the land, and also of certain machines used in brick-making, bricks manufactured and in the course of manufacture, and other goods and chattels upon the land. About a month later, an order was made for the winding-up of the company; and this action was brought by the liquidator to recover the machines and bricks and damages for the defendant's conversion of other chattels. By way of defence and counterclaim the defendant set up a claim upon the debentures transferred to him, a claim for a sum due upon an account, for damages for the conversion of bricks which the defendant had left upon the premises, for damages for injuries to the freehold, fixtures, and machinery, and for a sum and interest due upon two promissory notes given by the brick company for the price of a machine sold to it by the defendant, to replace an older machine of the same sort. The new machine was annexed by the company to the freehold as a permanent fixture; and, when the defendant took possession of the land, he also took possession of the machine so annexed:—

Held, upon the evidence, that the defendant was properly charged with \$6,300 for bricks, finished and unfinished, which came into his hands when he repossessed.

- (2) That the plaintiff was not entitled to recover the machines which were upon the premises when the defendant repossessed: the new machines, substituted for the old, formed part of the plant, and the defendant was entitled to take them, whether they were to be regarded as fixtures or not.
- (3) That the defendant could not justify taking and retaining other chattels on the premises, under the terms of the charge created by the debentures of which he was the holder: he held only \$24,000 worth of debentures, out of a total issue of over \$100,000; the other debenture-holders not being before the Court, there should be no adjudication in this action as to the right of the defendant to prove his claim upon the debentures in the winding-up.
- (4) That the defendant's claim for the amount of an account was properly allowed at \$546.05; the amount could not be set off, but the defendant should rank for it upon the assets in the liquidation.
- (5) That the circumstances stated with regard to the machine for which the company's promissory notes were given did not afford a legal defence to the claim upon the notes: the defendant was entitled to recover upon the notes and also retain the property until payment.

Canadian Westinghouse Co. v. Murray Shoe Co. (1914), 31 O.L.R. 11, and *Utterson Lumber Co. v. H. W. Petrie Limited* (1908), 17 O.L.R. 570, followed.

- (6) The defendant was not entitled to set off the amount of the notes against the plaintiff's claim, but was entitled to rank thereon upon the assets in liquidation: it was not a case of *mutual* debts: *Judicature Act*, R.S.O. 1914, ch. 56, sec. 126; *Winding-up Act*, R.S.C. 1906, ch. 144, sec. 71.

Eberle's Hotels and Restaurant Co. Limited v. Jonas (1887), 18 Q.B.D. 459, followed.

Moody v. Canadian Bank of Commerce (1891), 14 P.R. 258, distinguished. Judgment of MIDDLETON, J., varied.

ACTION by the liquidator of the Excelsior Brick Company Limited to recover certain machines used in the process of brick-making, bricks manufactured and in the course of manufacture, and other goods and chattels which had belonged to the said company, of which, as the plaintiff alleged, the defendant had wrongfully taken possession, and for an account of other goods

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and chattels also wrongfully taken possession of by the defendant, which he had sold, and damages for the wrongful seizure.

May 25 and 26, 1915. The action was tried by MIDDLETON, J., without a jury, at Hamilton.

A. C. McMaster and J. H. Fraser, for the plaintiff.

*C. A. Masten, K.C., and W. M. McClemon*t, for the defendant.

June 1, 1915. MIDDLETON, J.:—The transactions giving rise to this action are not particularly complicated. On the 6th March, 1913, Crane, who had theretofore carried on business as a brick-maker, contracted to sell his brick-yard to one Vane, who subsequently transferred the contract, with Crane's assent, to an incorporated company, the Excelsior Brick Company Limited. This company carried on business for about a year, but became in default under the contract, and on the 26th March, 1914, Crane took possession of the brick-yard and everything that was there. On the 8th April, 1914, the company passed a resolution to go into voluntary liquidation; and on the 24th April a winding-up order was made, under which Mr. Wade, the plaintiff, was ultimately appointed liquidator.

At the time when Crane took possession, he found upon the property a large quantity of finished bricks, and also bricks in the course of manufacture. He also took possession of certain machinery which had been brought upon the premises by the company. The particular machines concerning which the claim is made are an Augur Wire Cut Brick Machine and an Acme Brick Press. Wade claims now to recover damages for the conversion of the bricks and these machines.

Under the contract in question, possession was to be given, but the conveyances were not to pass until the full price was paid. Upon default the purchaser was to be entitled to resume possession and to forfeit all money paid. For the vendor's protection it was provided: "The purchaser agrees to operate the said plant so as not in any way to impair the value of the said plant or the lands connected therewith."

The defendant now counterclaims, alleging a breach of this provision, claiming to recover the value of timber cut down, fences destroyed, machinery removed or destroyed, and for

damages arising from improper changes in the physical condition of the plant.

A number of minor matters were disposed of without difficulty at the hearing. Upon the matters remaining for consideration, I have come to the conclusion that the clause which I have quoted from the contract does not contemplate that each individual part of the plant is to be kept in precisely the same plight and condition as it was at the time of the purchase, but that the purchaser's obligation is so to operate the plant that its value as a whole will not be reduced.

When the plant was purchased it was an old plant. It had been operated by Crane, since he purchased it, as a going concern, seventeen years before, without much being done in the way of renewing the machinery. Notwithstanding Mr. Crane's fondness for the machinery used and operated for so long, it had become dilapidated and out of repair. It was also antiquated, so that it was impossible to purchase parts for renewal and repair. The new machines substituted for the old were, I think, far better than the old ones, and I am satisfied that the plant as a whole, at the time Crane repossessed, was of greater value than the plant at the time he handed it over; but I do not think that this entitles the liquidator to recover anything on this head from Crane. Any increased value of the plant is Crane's profit arising from the default. The new machines formed part of the plant, and Crane was entitled to take them, quite irrespective of any refinements upon the question of whether they could technically be regarded as fixtures or not.

Trees were cut down, but the claim with respect to them is greatly exaggerated. The timber made from these trees was beneficially used upon the premises; so that I think the greater portion of the counterclaim is in this way got rid of. So also disappear the liquidator's claims with regard to the old machines.

With reference to the manufactured goods and the goods in the course of manufacture, I think Crane is guilty of conversion, and that this conversion took place after the date of the winding-up. The liquidator is therefore entitled to recover. I have had some difficulty in satisfying myself as to the exact number of bricks. On the whole I prefer the plaintiff's evidence, but think some allowance should be made; and I ascertain the value of the bricks taken at \$6,000.

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It is said that 300,000 bricks had been sold to one Zimmerman, and in the liquidator's memorandum the words, "per warehouse receipt to bank," are added. No evidence was given of this. If the goods had been sold, so far as I know there had been no separation from the bulk and nothing done by which the property would pass; yet I think Crane ought not to be placed in peril of another action; and, unless the consent of Zimmerman and the bank is filed, \$3,000, to represent the value of these bricks, should be paid into Court, subject, however, to further order. I also allow against Crane \$300 for coal and oil taken. Crane would be entitled to \$146.05, the amount of his account rendered, and \$300 for improper removal of fences, and \$100 for chattels converted; but these being liabilities of the company and not of the liquidator, and the company being in liquidation, there will be nothing beyond a declaration of his right to rank.

Crane received \$24,000 of mortgage debentures as part of his purchase-price. He is entitled to retain these as part of his forfeit. If he desires, he may have a declaration of his right to rank *pari passu* with the other holders of debentures upon the assets covered by the debentures, for this sum, together with the accrued interest; but I do not think that I can, in the absence of the mortgagee, make any other order with respect to this.

I do not think there is any right to set off the sum which I have declared Crane to be entitled to as against his liability for the bricks he took without colour of right. The liquidator might have repossessed the bricks in specie had he so chosen, and Crane could not have asserted a lien upon them for his claim as a creditor, nor could he have secured a preference over other creditors by taking possession of the chattels to which he had no title.

Any claims that I have not now specifically mentioned must be taken to be determined adversely to the respective claimants.

As the liquidator recovers a substantial sum, I can see no reason why costs should not follow the event.

The defendant appealed from the judgment of MIDDLETON, J.

November 22, 1915. The appeal was heard by GARROW, MAGEE, and HODGINS, JJ.A., and KELLY, J.

W. M. McClemon, for the appellant. All the assets belonged

to the bondholders, and the plaintiff had no such interest in the assets as would enable him to maintain the action: *Nash v. De Freville* (1899), 15 Times L.R. 264. The appellant, as the holder of bonds secured by a special charge on all the assets of the company, was entitled to take possession of the assets under the bonds in priority to any rights of the plaintiff: *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K.B. 344; *Johnston v. Wade* (1908), 17 O.L.R. 372. The appellant should be allowed \$1,926.31, being the amount of promissory notes of the company held by the defendant prior to the date of the winding-up order. The fact of retaining possession of the machines and not selling them under the Conditional Sales Act should be no answer by the company, the maker, to an action on the notes which had been given in payment of the machines: *Canadian Westinghouse Co. v. Murray Shoe Co.* (1914), 31 O.L.R. 11; *Utterson Lumber Co. v. H. W. Petrie Limited* (1908), 17 O.L.R. 570. The amount of these notes, as well as several items of account, should be set off against any judgment awarded the plaintiff: *Blumenstiel v. Edwards* (1905), 5 O.W.R. 796; Archbold's Common Law Practice, 14th ed., p. 781, note (e); *Sweet v. Benning* (1855), 16 C.B. 459.

A. C. McMaster and *J. H. Fraser*, for the plaintiff, respondent, contended that he was entitled to the assets of which the appellant was retaining possession, and to an accounting for any of which he had disposed. The action was practically one in detinue or for damages for conversion, and so the claims of the appellant could not be set off against the plaintiff's judgment, as there were no mutual debts: *Eberle's Hotels and Restaurant Co. Limited v. Jonas* (1887), 18 Q.B.D. 459; *Moody v. Canadian Bank of Commerce* (1891), 14 P.R. 258. As to the Zimmerman matter, there had been no proof of any sale to Zimmerman or of any existing pledge to the bank, and in these circumstances there should be no retention of moneys to satisfy this claim: *Re Victor Varnish Co., Clare's Claim* (1908), 16 O.L.R. 338. The appellant could not hold the machines in his possession and also claim on the promissory notes. He should have sold the machines under the Conditional Sales Act: *Snell v. Heighton* (1883), Cab. & El. 95; *Barker v. Furlong*, [1891] 2 Ch. 172.

McClemont, in reply.

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January 24, 1916. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendant from the judgment at the trial before Middleton, J., without a jury, in favour of the plaintiff.

The action was brought by the plaintiff, suing as liquidator of the Excelsior Brick Company Limited, to recover certain machines used in the process of brick-making, bricks manufactured and in the course of manufacture, and other goods and chattels which had belonged to the Excelsior Brick Company, of which, it was alleged, the defendant had wrongfully taken possession, and for an account of other goods and chattels also wrongfully taken possession of by the defendant, which he had sold, and damages for the wrongful seizure.

The facts are simple, and practically, except as to the quantity and price of the brick, not in dispute.

The defendant, prior to March, 1913, owned a brick-yard in the township of Clinton, in the county of Lincoln, which he had operated for many years. On the 6th of that month, he gave to one Vane, acting for the Excelsior Brick Company, a written option to purchase the brick-yard and plant, at the sum of \$110,000, of which \$1,000 was paid in cash, \$9,000 was payable when title was shewn to be satisfactory, \$20,000 by transferring to the defendant \$24,000 in treasury debentures, and \$12,000 of paid-up stock in the Excelsior Brick Company, and the balance of \$80,000 in eight instalments of \$10,000 each on the 1st March in the years 1914, 1915, 1916, 1917, 1918, 1919, 1920, and 1921, without interest.

The option was transferred, with the defendant's consent, to the Excelsior Brick Company, and that company exercised the option and became the purchaser and made the cash payment of \$9,000 and delivered to the defendant the debentures and paid-up stock, as agreed upon, and was let into possession.

One of the terms of the agreement was that the purchaser, while in possession, agreed to operate the plant so as not to impair its value or that of the lands connected therewith. Another term provided that, upon default in paying the instalments of purchase-money or any of them, the purchaser's right under the contract should cease, and the defendant as vendor might re-enter.

The Excelsior Brick Company carried on the business for

about a year, but made default in paying the instalment which fell due in March, 1914, whereupon the defendant proceeded to take possession, not only of the lands, but also of the chattel property now claimed by the plaintiff as liquidator.

Middleton, J., after hearing much evidence, and after apparently making a considerable allowance to the defendant, reached the conclusion that a fair sum with which to charge him for the bricks, finished and unfinished, was the sum of \$6,300, of which sum he directed \$3,000 to be paid into Court to abide further order, to meet any claim to be made by one Zimmerman.

No sufficient case is, I think, made upon this appeal to justify interfering with the learned Judge's conclusions in that respect. If in the result injustice is done to the defendant, he has himself largely to blame for not keeping a reliable record of what came to his hands when he entered into possession.

The machines to which the plaintiff made claim were a boiler, a four-mould machine and a wire-cutting machine, all purchased by the Excelsior Brick Company and affixed to the land as part of the permanent plant, in substitution (of which the defendant complained) for old machinery in use when the Excelsior Brick Company purchased. As to these, the learned Judge dismissed both complaints: a conclusion with which I also agree.

The defendant attempted to justify taking and retaining the goods and chattels under the terms of the charge created by the debentures or bonds of which he is the holder. But out of a total issue of over \$100,000 (the exact amount is not, I think, mentioned in the evidence) he only holds to the amount of \$24,000. Middleton, J., was of the opinion that the defendant could not so justify, but by his judgment permitted him to prove before the liquidator *pari passu* with the other bondholders for the amount of his holdings.

I agree that the attempted justification fails; but, in the absence of the other bondholders, who are not represented before us, it seems to me that the judgment should go no further, especially as the defendant does not require the aid of the Court to enable him to prove under his bonds. I would therefore strike out paragraphs 3 and 4 of the formal judgment.

The defendant also set up by way of defence and counterclaim certain claims against the brick company, some of debt and others

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of unliquidated damages. Of these the claims persevered in at the trial were, in addition to the claim under the bonds or debentures before referred to, a sum claimed to be due upon an account, damages for the conversion of brick which the defendant had left upon the premises, damages for injuries to the freehold, fixtures, and machinery, and a sum of \$1,925 and interest owing upon two promissory notes made by the brick company; these being the lien-notes in question in the other action of *Crane v. Hoffman* now pending.

Middleton, J., allowed the defendant's claim under his account at the sum of \$546.05; he held however, that the amount could not be set off, but that it might rank upon the assets in the liquidation. I agree with both conclusions.

Nothing was allowed by Middleton, J., upon the promissory notes. They are not even mentioned either in the notes of judgment or in the formal judgment. They cannot, I think, have been intended to be included in the general clause in the notes of judgment which says: "Any claims that I have not now specifically mentioned must be taken to be determined adversely to the respective claimants." But, if it was so intended, I would, with deference, be unable to agree. The notes were given for the price of a machine bought by the brick company from the defendant, to replace an older machine of the same sort, and the new machine was, upon the evidence, annexed to the freehold by the brick company as a permanent fixture, with the result that, when the defendant took possession of the land upon the forfeiture by the brick company, he also took possession of the machine so annexed. In the other action the surety claims that he has been discharged because the defendant did not, under the Conditional Sales Act, proceed to sell the machine, but used it as part of the brick-making plant. But, whatever may be the result in so far as the surety is concerned, the circumstances mentioned cannot, I think, afford a legal defence to the claim against the maker, the brick company.

In *Canadian Westinghouse Co. v. Murray Shoe Co.*, 31 O.L.R. 11, it was held by a Divisional Court that the holder of a lien might, in the assertion of his common law rights, sue for the instalments as they became due, and also retain the property until payment. A similar conclusion is expressed in *Utterson Lumber Co. v. H. W. Petrie Limited*, 17 O.L.R. 570.

There is the further circumstance in this case, that the annexation to the freehold was made by the brick company itself, to take the place of a machine which had belonged to the defendant. That being so, it seems absurd to suggest that, in order to entitle him now to sue the brick company upon the notes, the defendant should first disintegrate his plant and sell the machine, and only recover for the balance, if any, remaining after the sale.

I therefore am of the opinion that the defendant is entitled to recover against the brick company the full amount due and owing upon the notes; and that he is, under the circumstances, under no compulsion to sell the machine for which they were given. But I am unable to agree with the defendant's further contention that he is entitled to set off the amount of the notes against the plaintiff's claim. The position is similar to that of the claim upon the account which has been before dealt with. As in that case, so in this, the defendant should be declared entitled to rank upon the assets in liquidation, but not to the set-off claimed.

The claims in both cases are pleaded by way of counterclaim. That in itself would not be fatal if the correct conclusion should be that the claims, although called counterclaims, are really set-offs. See *Gates v. Seagram* (1909), 19 O.L.R. 216. Section 126 of the Judicature Act, R.S.O. 1914, ch. 56, provides that "where there are *mutual* debts between the plaintiff and defendant . . . one debt may be set against the other." And this right of set-off is preserved by sec. 71 of the Winding-up Act, R.S.C. 1906, ch. 144. The defendant's difficulty, however, is, that the plaintiff's claim is not a debt, but a claim really, in form at least, of *detinue*, or in the alternative for damages. It is not therefore a case of mutual debts, and hence not the proper subject of set-off. In *Eberle's Hotels and Restaurant Co. v. Jonas*, 18 Q.B.D. 459, the facts were very similar. The language of the statute there in question was, "where there have been mutual credits, mutual debts, or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order." And the Court of Appeal held that, under these words, there was no right in the defendant in an action of *detinue* to set off a claim for goods sold and delivered. See also

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Moody v. Canadian Bank of Commerce, 14 P.R. 258, where the set-off claimed was allowed, but solely on the ground that the claim, originally one for damages caused by a malicious prosecution, had been converted by the judgment into a debt.

To the extent indicated, I would, for these reasons, allow the appeal, but, under the circumstances, without costs. The liquidator will, of course, have his costs of this appeal out of the estate.

Appeal allowed in part.

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Sale of Goods—Conditional Sale of Machine—Contract—Provisions of—Property not to Pass until Price Paid—Sale in Default of Payment and Application of Proceeds upon Notes Given for Price—Liability of Guarantor of Notes—Possession of Machine Taken by Vendor under Earlier Contract for Sale of Land and Machinery—Retention of Machine and Use in Business—Inability to Hand over Security Unimpaired—Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 9—Fixture—Waiver—Discharge of Surety.

The plaintiff agreed to sell a brick-yard and plant and machinery to a brick company, the deed to be held in escrow until payment of the purchase-price. The brick company took possession under the agreement, and, for the purpose of making bricks, bought from the plaintiff a new machine, to replace one that had been sold with the brick-yard. The sale was upon the terms of a conditional sale contract, by which the property in the machine was not to pass until the price was paid. This stipulation was added to each of two promissory notes given for the price. The defendant guaranteed the payment of the notes. The notes each contained a provision that upon default in payment of the notes the plaintiff should be at liberty to take possession of and sell the machine and apply the proceeds upon the notes, after deducting costs of repossessing and selling. The machine was annexed to and became part of the realty; and, default having been made by the company in payment of the price of the land, etc., the plaintiff took possession of the land, and, with it, possession of the machine. He operated the yard, and in doing so used the machine as an integral part of the plant, treating it as his own property:—

Held, by MIDDLETON, J., the trial Judge, in an action to recover the amount of the notes, against the defendant as guarantor, that the plaintiff could not recover that which was in truth the price of the chattel sold, because his conduct had been inconsistent with his obligations as vendor—the use he had made of the machine was not contemplated by the contract, and was inconsistent with his obligation to hold it ready for delivery.

Upon appeal by the plaintiff, the four Judges composing a Divisional Court of the Appellate Division were evenly divided in opinion, and the judgment of MIDDLETON, J., stood as if affirmed.

Per GARROW and MAGEE, JJ.A.:—The affixing of the machine to the land must be assumed to have been done with the full knowledge and consent

of the defendant, who was a director of the brick company. The plaintiff took possession, not under the lien-notes, but as owner of the freehold and by virtue of the forfeiture provided for in the agreement for sale of the freehold to the brick company. The law of fixtures has been altered by the provisions of sec. 9 of the Conditional Sales Act, R.S.O. 1914, ch. 136, but only to the extent of giving the seller a right, which otherwise he would not have, to follow the goods, with a corresponding right on the part of the owner of the land to keep them on paying what is unpaid upon them. But the seller here was the owner of the land—a case not provided for by the statute. The defendant, as surety, was entitled for his indemnity to the benefit of all the securities for the debt held by the creditor, the plaintiff; but the plaintiff no longer held the machine as security for the debt. The title to it as a chattel merged, by the annexation with the defendant's consent, in the freehold. It stood much upon the same footing as if it had been lost or destroyed without fault on the plaintiff's part. But, in any event, the defendant, by his conduct, had in advance waived any right to complain.

Per HODGINS, J.A.:—If the brick company annexed the machine to the soil, it did so subject to sec. 9 of the Conditional Sales Act. At that time the land was in equity the land of the company; and, while the statute operated, neither it as owner nor a purchaser from it nor a mortgagee or other incumbrancer, even without notice, could claim the machine as against the seller without paying the price. The plaintiff must be willing, if he was to recover judgment on the footing of the contract, the performance of which the defendant had guaranteed, to perform it on his part. The operation and use of the machine had disabled the plaintiff from effectively giving the defendant that to which, upon payment, he would be entitled. The alteration of the defendant's rights as surety discharged him from liability, because he could insist on literal compliance with the contract, the performance of which he guaranteed; and this notwithstanding that it might work out in a way not contemplated by the plaintiff when he took the defendant's obligation.

Per KELLY, J.:—Assuming that the defendant was aware of the conditions imposed by the earlier agreement and the plaintiff's right to possession thereunder in the event of default, there was nothing opposed to the position that the later agreement was to be taken as a modification of the terms of the earlier. The language of the contract contained in the notes, and of the defendant's guaranty, was quite consistent with that view, and the interpretation might readily be put upon it that the guarantor assumed liability having in mind the degree of protection against that liability which realisation by sale of the machine afforded in the event of the purchaser's default. If the plaintiff had in mind that the agreement for sale of the machine was to be subject to his rights under the earlier agreement, he should have so expressed himself; and he could not now complain if he was held strictly to compliance with the express terms of the later agreement.

ACTION to recover the sum of \$1,925 and interest alleged to be due upon two promissory notes for \$962.50 each, made by the Excelsior Brick Company and endorsed by the defendant.

May 26, 1915. The action was tried by MIDDLETON, J., without a jury, at Hamilton.

W. M. McClemon, for the plaintiff.

S. H. Bradford, K.C., for the defendant.

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June 9, 1915. MIDDLETON, J.:—This action arises out of the transactions giving rise to the action of *Wade v. Crane, ante*. The material facts, so far as this case is concerned, are that Crane, the owner of a brick-yard, agreed to sell it, the deed to be held in escrow until the payment of the purchase-price. The assignee of the purchaser, the Excelsior Brick Company, in carrying on its business, desired to replace a broken-down machine by one which was new and up-to-date. Crane purchased the machine desired, and agreed to sell it to the company, under the terms of a conditional sale contract, by which the property was not to pass until the price was paid. This stipulation is added to each of the notes sued upon. The defendant is an endorser of the notes. The machine was annexed to and became part of the realty; and, default having been made in carrying out the purchase of the land, Crane took possession of the land, and, with the land, possession of this machine. He operated the yard, and in the course of the operations has used the machine as an integral part of the plant, treating it as his own property. He now sues the surety. The defence is rested upon the theory that, the property not having passed, and the vendor having retaken possession and treated the machine as his own, he cannot recover for the price. The contract contains a provision that upon default of payment of the notes the vendor shall be at liberty to take possession of and sell the property and apply the proceeds upon the notes, after deducting costs of repossessing and selling.

I do not think that the vendor can recover that which is in truth the price of the chattel sold, because his conduct has been inconsistent with his obligations as vendor. Although the property in the machine was not to pass until the price was paid, and although the vendor was within his rights in taking possession upon default, he was, I think, bound to keep the machine in the same plight and condition as when he repossessed it, and to hold it ready at all times for delivery, unless the contract gave him some other and wider right.

The contract here has given a wider right, but not the right to do what he has done. He was at liberty under the contract, on resuming possession, to sell the property and apply the proceeds upon the note. He has not sold the machine, but he has used it as part of his own brick plant; and he cannot, I think, now call

upon the purchaser to accept a machine which he has applied to his own purposes. It is no answer to say that the machine has not been much depreciated by this use, and that compensation can be made. It is sufficient that the use which he has made of the machine was not contemplated by the contract, and is inconsistent with his obligation to hold it ready for delivery.

There may be other difficulties in the plaintiff's way, but they need not be investigated or discussed. The action fails, and must be dismissed with costs.

The plaintiff appealed from the judgment of MIDDLETON, J.

November 23, 1915. The appeal was heard by GARROW, MAGEE, AND HODGINS, JJ.A., and KELLY, J.

*W. M. McClemon*t, for the appellant, argued that he had a right to take back his property irrespective of the lien-note. He took it back as owner of the land, and under the conditions of forfeiture contained in the original agreement for sale: *Sawyer v. Pringle* (1891), 18 A.R. 218; *Arnold v. Playter* (1892), 22 O.R. 608. The appellant had a common law right to retain the machine until payment should be made. The Conditional Sales Act did not apply at all, as the machine had become affixed to the realty, and had itself thus become realty before the notes fell due.

S. H. Bradford, K.C., for the defendant, respondent, contended that the appellant had put himself beyond the power of succeeding on the note by using the machine as his own: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 6, p. 480. The Conditional Sales Act applied; and, even though by annexation the machine became part of the freehold, sec. 9 of the Act applied. The appellant did not sell as provided by the Act. He retained the machine and used it in his business. By thus utilising the machine he had lessened its value, and put it beyond the possibility of being redeemed. This was a use not contemplated by the contract, and so released the surety, who could insist on a literal compliance with the contract: *Utterson Lumber Co. v. H. W. Petrie Limited* (1908), 17 O.L.R. 570; *McEntire v. Crossley Brothers Limited*, [1895] A.C. 457.

*McClemon*t, in reply.

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January 24. GARROW, J.A.:—Appeal by the plaintiff from the judgment of Middleton, J., in favour of the defendant, at the trial without a jury.

The action was brought to recover the sum of \$1,925 and interest due upon two promissory notes for \$962.50 each, made by the Excelsior Brick Company, an incorporated company, both in the form following: "Toronto August 28th, 1913. On the 28th day of October, 1913, I promise to pay George Crane or order, at the Union Bank of Canada, Grimsby, Ont., nine hundred and sixty-two dollars and fifty cents with interest at the rate of eight per cent. per annum both before and after maturity until actually paid. This note is given in payment of Four Mould Boyd Brick Press, being number . The title of the above property for which this note is given is not to pass, but to remain in the payee of this note until the note is paid, and in case of default in payment the payee shall be at liberty without process of law to take possession of and sell the said property and apply the proceeds upon this note, after deducting all costs of taking possession and sale. Excelsior Brick Company Limited."

The defendant and one Vane were directors of the brick company, and gave upon the back of each of the notes the following written guaranty: "We hereby guarantee the payment of the within note and interest upon maturity in accordance with the terms thereof. C. Vane. J. H. Hoffman."

The making of the notes and the giving of the guaranty are not in dispute. The substantial defence is, that the dealings of the plaintiff with the machine for the price of which the notes were given, after they fell due, had the legal effect of cancelling the notes, or at all events of discharging the surety.

It appears that in the month of March, 1913, the plaintiff, who had theretofore carried on the business of brick-making, contracted to sell his brick-yard and premises to the guarantor Vane, who subsequently, with the plaintiff's consent, transferred the contract to the then recently organised Excelsior Brick Company. Under the contract, immediate possession was to be given, but the conveyances were not to pass until the purchase-money was paid, and upon default the vendor was to be at liberty to resume possession, and all money theretofore paid on account of purchase-money was to be forfeited. And the purchaser, while in possession,

agreed to operate the plant so as not to impair its value or that of the lands connected therewith.

The Excelsior Brick Company, after making certain payments on the purchase-money and carrying on business for almost a year, made default, and on the 26th March, 1914, the plaintiff took possession under the terms of the contract of sale, and excluded the brick company.

Before that, namely, in the previous month of August, the plaintiff sold to the brick company the machine for which the notes now sued on were given.

The brick company displaced an older machine used by the plaintiff for many years, and in its place affixed the new machine for which the notes were given, and thereafter used it as part of the brick-making plant until the plaintiff resumed possession. After the plaintiff resumed possession, he also resumed the business of brick-making, and in so doing continued to use the new machine as part of the plant.

In consequence of such action on the part of the plaintiff, Middleton, J., was of the opinion that the plaintiff had lost his right to maintain this action. [GARROW, J.A., then quoted from the judgment of Middleton, J., the paragraph beginning "I do not think that the vendor can recover" and the paragraph next following, and continued:]

The judgment, it will be seen, proceeds entirely upon the theory that the plaintiff had taken possession of the machine under the lien contained in the notes, and that his retention and use of it were inconsistent with his duty. The duty referred to is, I assume, that prescribed by sec. 8 of the Conditional Sales Act, R.S.O. 1914, ch. 136, not to sell within twenty days, nor, if a balance is intended to be claimed, without notice in writing of the intended sale.

But, with deference, this pronouncement seems entirely to ignore the important circumstance that the machine had, before the notes became due, been affixed to the freehold, thereby losing its character of a personal chattel, and, *primâ facie* at least, becoming subject to the title to the land.

The general law of fixtures, a very wide subject, is not, I think, involved, but merely an elementary rule or two. And the first is that of the intention of the party who affixes. There can

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be no doubt that the brick company, then the equitable owner of the land under the agreement to purchase, intended the new machine to take the place of the old one and to become a necessary part of the permanent plant. The next is the mode and extent of the affixing, which in this case was by placing the new machine upon a cement foundation specially prepared for it, bolting it down to prevent vibration, and connecting it up with the other steam-driven machinery of the plant. These circumstances seem ample to determine, for the purposes of this action, the character of the machine thereafter as that of a fixture. See *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Reynolds v. William Ashby and Son Limited* (1904), 20 Times L.R. 766, [1904] A.C. 466.

The effect upon the title to chattels affixed, and the modern application of the ancient maxim *quicquid plantatur solo, solo cedit*, is also discussed in *Gough v. Wood & Co.*, [1894] 1 Q.B. 713, at pp. 718, 719, and in *Wake v. Hall* (1883), 8 App. Cas. 195.

The affixing, it must be assumed, was done with the full knowledge and consent of the defendant, a director of the company.

At that time no default had occurred in payment of the purchase-money by the brick company. Had that default not subsequently occurred, the situation would, of course, have been very different. But nothing is more distinct upon the evidence than that when, in March, 1914, the plaintiff took possession, he did so, not under the lien-notes, but entirely as owner of the freehold and by virtue of the forfeiture provided for in the agreement of sale to the brick company. He now stands upon that title, and I am not able to see a good reason why he may not, and may not also claim payment of the lien-notes, which have not been paid, from the brick company, and this defendant as guarantor.

The machine, as before pointed out, was purchased, or at all events was used, the plaintiff thinks unnecessarily, to replace an old machine of the same kind which had belonged to the plaintiff, forming part of the plant agreed to be sold to the brick company, but which the brick company discarded as worn out. The fact that the machine itself, after several months' use and wear by the brick company, came back to the plaintiff by virtue of his original and superior title as owner of the land, is clearly not in itself an answer to the claim; and the Conditional Sales Act seems to have little or no application. The law of fixtures has, of course, been

altered by the provisions of sec. 9, but only to the extent therein described, which clearly is confined to giving the seller a right, which otherwise he would not have, to follow the goods, with a corresponding right on the part of the owner of the land to keep them on paying what is unpaid upon them. But the seller here is also the owner of the land—a case not contemplated, or at least not provided for, by the statute.

The plaintiff did nothing to bring about the position of which the defendant complains. He has been guilty of no negligence or bad faith. He may have known that annexation of the machine to the freehold was intended, but he had nothing to do with making it. At that time he expected to be paid both for his land and for the machine.

The defendant was familiar with all the material facts from the beginning. As a director of the brick company, he knew of the agreement to purchase the brick-yard premises, and he knew of its terms, which, among other things, provided for the maintenance by the company of the premises until the conveyance was obtained, and for a forfeiture of its rights by the company upon default in payment of the purchase-money. He knew, when the machine was purchased, that it was intended to affix it as a permanent part of the plant in the place of the older discarded machine, and with such knowledge he consented to become and became a guarantor. He, as surety, is, of course, entitled for his indemnity to the benefit of all the securities for the debt held by the creditor, the plaintiff. But the plaintiff no longer holds the machine as security for the debt. The title to it as a chattel merged, by the annexation with the defendant's consent, in the freehold. If it had even been paid for in cash, the defendant company would have had no right, under the circumstances, to remove it after the forfeiture. It stands, I think, very much upon the same footing as if it had been lost or destroyed without fault on the plaintiff's part: see *Goldie and McCulloch Co. v. Harper* (1899), 31 O.R. 284, in which a Divisional Court held that the destruction by fire of machinery (part of which had become fixtures) was no answer to a claim for unpaid purchase-money.

But, in any event, the defendant, by his conduct, has in advance waived any right to complain. In *Hollier v. Eyre* (1842), 9 Cl. & Fin. 1, at p. 52, Lord Cottenham says: "The surety

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cannot be discharged by any arrangement with the principal, of which he is informed and approves, or which he permitted the opposite party to conclude upon the supposition that the surety approved." See also to the same effect *Woodcock v. Oxford and Worcester R.W. Co.* (1853), 1 Drew. 521.

For these reasons, I think the appeal should be allowed and the plaintiff should have judgment for the amount of the notes with interest and his costs throughout.

MAGEE, J.A.:—I agree.

HODGINS, J.A.:—The Excelsior Brick Company obtained the machine in question upon giving the agreement which permitted the appellant to retake possession on default, and to sell. The company placed it upon its land and attached it so as to make it a fixture, so far as it could do so. I am, however, unable to agree with the view that this annexation, if of such a character as to make the machine in law a fixture, determines the case. The appellant and the Excelsior Brick Company and the respondent are the parties to the contract under which the machine was acquired. The brick company obtained it, and, if the company annexed it to the soil, it did so subject to sec. 9 of R.S.O. 1914, ch. 136, which is as follows: "Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them."

At that time the land was in equity the land of the company; and, while the statute operated, neither it as owner nor a purchaser from it nor a mortgagee or other incumbrancer, even without notice, could claim the machine as against the seller without paying the price. This seems to have been the law in this Province even before the statute. See *Joseph Hall Manufacturing Co. v. Hazlitt* (1885), 11 A.R. 749. Burton, J.A., in that case, which involved the right of a landlord, to whom the tenant, after annexing a chattel, the property in which remained in the plaintiffs, to the soil, had surrendered his term, thus deals with a case as between the immediate parties to such a contract as exists in this

case (p. 750): "The owner of the property would not cease to be owner, but there might be a difficulty in asserting his rights; if, for instance, a man should convert a quantity of bricks and erect them into a house they would have lost their legal identity as chattels so as to be incapable of recaption by the original owner; but if the purchasers in this case had placed these wheels on their own property could they have successfully resisted a claim by their vendor on the ground that they had converted them into freehold, although the vendor must be held to have known that it was intended so to use the property that it would be annexed to the freehold? He would be entitled to rely on the agreement between him and his vendee that, as between them, it should under all circumstances be regarded as personal property,"

It may be that subsequent English cases have rendered some expressions in the judgment of doubtful authority, but this quotation I have given is not one of them.

In *Hobson v. Gorringe*, [1897] 1 Ch. 182, a case between the owner of a gas-machine, Hobson, and a mortgagee, Gorringe, whose mortgage was taken after annexation but without notice of the agreement between King and Hobson, the Court says (p. 192): "It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—i.e., part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price or for damages for

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the loss of the chattel is by action against King, or, he being bankrupt, by proof against his estate." And again (p. 195): "That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a *de facto* fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced."

That case must now be read, so far as a mortgagee is concerned, as subject to our statute. But it is clear authority for the position that, prior to the forfeiture of the company's title, at all events, the annexation did not deprive the appellant of this right to enter and remove the machine, to sell it, and to recover the balance of the contract price.

The real question, therefore, is, whether the forfeiture of the company's title and the entry of the appellant changed the rights of the parties. I am unable to see how the appellant can both claim the machine and yet seek to recover from the respondent, as guarantor, the price of it. The fact that the guarantor, as president of the insolvent company, had knowledge of an antecedent agreement which gave the appellant the right to take possession of substituted machines, does not impair his right to contend that the contract of suretyship was based upon a modification or even a contradiction of that right. The appellant must be willing, if he recovers judgment on the footing of the contract, the performance of which the respondent has guaranteed, to perform it on his part. The principle applied in the case of a mortgagee who has foreclosed and yet sues the mortgagor is one which is applicable here, as it is founded on justice and common sense. He opens up the foreclosure and becomes again a mortgagee, and must restore the land if he proceeds to collect the mortgage moneys: *Stark v. Reid* (1895), 26 O.R. 257.

If the respondent is liable upon the notes and pays them, then he is entitled to have assigned to him all the securities of the appellant, of which the contract is one.

He would also be entitled to the possession of the machine, which the appellant must give him, and he could detach it from

the realty and remove it. The operation and use of the machine by the appellant would not impair that legal right, but the question is, whether it has disabled the appellant from effectively giving the respondent that to which, upon payment, he would be entitled. To my mind, the fact of user by the appellant of the machine of which he was owner is not, under some circumstances, inconsistent with his contract rights. If the property in a chattel has passed, its sale and its user would be tortious acts for which the purchaser would have an action. Where the property has not passed, the owner must, if he take possession, retain the chattel so as to enable him to fulfil the contract.

If the user was a necessary one, and if it was temporary only until the vendor exercised the rights given to him by the contract, it could hardly be said that it was improper and a breach of duty, especially if it was accompanied with notice of intention to put into operation the remedies provided by the contract.

In the case in hand the rights given on default are "to take possession of and sell the said property and to apply the proceeds upon the note after deducting all costs of taking possession and sale."

Construing this power literally and grammatically, "to take possession of and sell" means, I think, that the vendor, if he takes possession, must sell. His remedy is not to do one and not the other, but to do both. This is helped by the provision that the proceeds are to be applied in reduction of the liability on the note, something of great importance to the surety, who may have no knowledge of the vendor's proceedings.

The appellant here was not bound to use the machine. He could have detached it or let it lie idle. If he found it commercially necessary to utilise it, he could have notified the parties liable that he did so only while his hands were tied by the Conditional Sales Act, and without prejudice to his right and intention to sell.

But he cannot, I think, retain it and make it part of his manufacturing plant and continue its employment as such without seriously prejudicing those who became sureties upon the condition that if default occurred his remedy was repossession, sale, and application of the proceeds upon the notes.

The only other possible view is that, if the user affects the value and merely reduces it, the purchaser may have to pay the price subject to the remedy which, in an ordinary case of sale, he

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would have, if the vendor delivered, in pursuance of his contract, the article sold, but inferior in character.

I think the answer to this view is, that the vendor, owning the goods, but parting with their possession, has reserved to himself only the remedies stipulated for, and not those which, under other circumstances, the law would imply.

Upon the whole, I think the actions of the appellant indicated an intention not to realise his security, according to its terms, but to treat the contract in a way not authorised. His continued use of the machine for his own profit and as part of his own possessions, and his failure to sell or take any steps to that end, are inconsistent with the position he now desires to take. The basis of the sureties' liability has been changed by him, it is said, to their detriment. But, whether that is so or not, the alteration of their rights discharges them from liability, because they can insist on literal compliance with the contract, the performance of which they guaranteed. And this is so, notwithstanding that it may work out in a way not contemplated by the vendor when he took their obligation. The cases of *A. Harris Son & Co. v. Dustin* (1892), 1 Terr. L.R. 404, *Moore v. Johnston* (1909), 9 W.L.R. 642, and *North-West Thresher Co. v. Bates* (1910), 13 W.L.R. 657, proceed upon views similar to those I have expressed.

The appeal should be dismissed with costs.

KELLY, J.:—The learned trial Judge has found that the appellant, when he repossessed the machine for the price of which the notes sued upon were given, exceeded what the contract authorised, and, instead of complying with the terms which required him to sell, he treated the machine as his own and made use of it as part of his brick-making plant. His right under that contract was, upon default in payment of the notes, to take possession and sell and apply the proceeds upon the notes after deducting the cost of taking possession and sale. Had he pursued that course, he would have been entitled to claim against the guarantors for any deficiency resulting from the sale.

The position which he takes, as it appears from his evidence, and it was so urged on the argument, is, that he did not retake possession on the lien reserved in the notes, but in pursuance of the terms of the earlier sale by him of the brick-making plant, one

of which terms is, that "on default in payment of any instalment of principal, or failure to carry out any of the conditions imposed by the agreement, the vendor" (the appellant) "shall be at liberty to cancel and rescind this agreement and to enter into possession and resell the said lands"—any payments theretofore made by the purchaser to be retained by the vendor.

Standing alone, this would undoubtedly be authority for possession of the machine as part of the lands to which it was, after the agreement, affixed, and to deal with it as part of the lands so taken. But, on the sale of the machine in question by the appellant to the brick company, special terms were introduced into the notes guaranteed by the respondent, giving to the appellant a new and different right, namely, in case of default in payment to take possession without process of law and sell the property (the machine) and apply the proceeds upon the notes after deducting all costs of taking possession and sale. What the respondent guaranteed was payment of the notes and interest "in accordance with the terms thereof." It is to such a contract that, under ordinary circumstances, sec. 9 of the Conditional Sales Act, R.S.O. 1914, ch. 136, applies, that section being: "Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them."

The question, therefore, that presents itself is, whether the appellant had the right to take possession of the machine by virtue of the earlier agreement, ignoring the terms of the later one, or was the latter to be treated as independent of the other and so binding upon him to deal with the machine, upon default in payment, strictly upon the terms of sale as expressed in the notes? If the latter, then, to the extent of the amount that might have been realised, the notes would have been satisfied and the liability of the guarantors extinguished. That, in my opinion, is the position in which the appellant is placed; and the fact that the respondent was associated with the brick company does not alter that position. Assuming that he was aware of the conditions

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imposed by the earlier agreement and the appellant's right to possession thereunder in the event of default, there is nothing opposed to the position that the later contract was to be taken as a modification of the terms of the earlier agreement. The language of the contract contained in the notes, and of the respondent's guaranty, is quite consistent with that view, and the interpretation may readily be put upon it that the guarantor assumed liability having in mind the degree of protection against that liability which realisation by sale of the machine afforded in the event of the purchaser's default in payment. If the appellant had in mind that the agreement for sale of the machine was to be subject to his rights under the earlier agreement, he should have so expressed himself; and he cannot now complain if he is held strictly to compliance with the express terms of the later agreement. To hold otherwise would be to ignore the element of protection which the guarantor would have if the property were repossessed and resold in the event of default.

Viewing the transaction in the manner I have indicated, and apart from other reasons, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed, the Court being divided.

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FOSTER V. TRUSTS AND GUARANTEE CO.

Assignments and Preferences — Conveyance of Land in Trust to Raise Money, Complete Buildings, and Pay Creditors—Assignments and Preferences Act, sec. 9—Mortgage Made by Trustee—Recoupment of Advances by Trustee—Validity of Mortgage—Absence of Fraud.

A person carrying on a lumber business, and owning several parcels of vacant land, conveyed them to a solicitor, upon trust to complete certain houses in the course of erection upon three of the parcels, and for the purpose of borrowing upon the security of the land or otherwise, and selling the land and personal property and collecting the debts due to the grantor (the personal property and debts, however, not being conveyed or assigned), and thereout to pay the trustee's own remuneration and all preferential claims, and then pay the ordinary creditors of the grantor, with an ultimate trust in favour of the grantor. A recital in the deed spoke of the financial embarrassment of the grantor and an assignment of all her property to enable her debts to be paid in full:—

Held, that the trust deed was not an assignment under sec. 9 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.

Held, also, that a mortgage of part of the land conveyed to the trustee, made by him in favour of the plaintiff, was, in the circumstances set out below, to be regarded as made for the benefit of the trust estate—the moneys of the plaintiff going to recoup the trustee for advances made by him personally to the trust estate—and that the defendant company, the successor of the solicitor in the trust—no fraud or bad faith being shewn—failed in its attempt to impeach the validity of the mortgage.

Judgment of MIDDLETON, J., affirmed.

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A mortgage action for foreclosure.

June 21, 1915. The action was tried by MIDDLETON, J., without a jury, at Toronto.

W. E. Raney, K.C., for the plaintiff.

J. Jennings, for the defendant company.

June 23, 1915. MIDDLETON, J.:—A man named Moses Ellenson was carrying on business in Toronto under the name of the Ellenson Lumber Company. The title to this business and the land connected with it was in Esther Ellenson, his daughter. Ellenson had received conveyances of various parcels of vacant land in payment for lumber. In the result, he found himself in an embarrassed position financially, but claimed that there was a considerable surplus in his assets.

On the 26th August, 1913, Miss Ellenson made a conveyance of certain real estate to Mr. Lobb, a barrister and solicitor practising in Toronto, upon trust to complete certain houses in the course of erection upon three of nine parcels conveyed, and for the purpose of borrowing upon the security of the land and selling the land and personal property and collecting the debts due to the company and thereout to pay his own remuneration, all preferential claims, and then pay the ordinary creditors, with an ultimate trust in favour of the grantor. It will be noted that the clauses in the deed are inconsistent, as the only conveyance in the deed is of the land, yet the clause defining the trust speaks of the realisation of the personal property and the debts due the assignor. There is a recital in the deed which speaks of the financial embarrassment of the assignor and an assignment of all her property to enable her debts to be paid in full.

The underlying idea was that Ellenson's connection with the lumbering and building business would enable the buildings to be

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erected on such advantageous terms that there would be in the end a substantial surplus. The transactions undertaken by Lobb seem to have become very large and involved. According to the statement verified by Lobb's bookkeeper, Lobb has disbursed \$110,410, and has received \$67,943, leaving a balance in his favour of \$42,766. This statement, however, antedated the trust deed, and it appears that Lobb had disbursed for Ellenson about \$12,000 prior to that date.

Mr. Lobb left the Province, and was examined under commission in New York. Upon his examination he states that the trust owes him at least \$25,000. Upon the trial various statements were made reflecting upon the accuracy of these figures, but they were not seriously impeached.

Foster was also a client of Lobb's and on the 5th June Lobb received for him the sum of \$5,848.88, and being then in an embarrassed position, not only by reason of the condition of the Ellenson account, but by reason of other transactions, Lobb used this money for his own purposes, and possibly to some extent for the purposes of the trust. There might be some difficulty if the plaintiff's claim depended upon following this specific money into this trust. Foster, however, shortly demanded his money, but it was not forthcoming, and Lobb claimed that he had used it in the erection of these houses; and finally Foster accepted a mortgage upon some portion of the trust property where the houses were situated, as security for his claim. The mortgage is dated the 10th September, 1914. This action is brought to enforce the mortgage by foreclosure.

In the meantime, after Lobb had left Ontario, an order was made on the 1st December, 1914, appointing the Trusts and Guarantee Company trustee under the trust deed in question, in place of Lobb; the application for this order was made under the Trustee Act, R.S.O. 1914, ch. 121.

The plaintiff's claim is put by Mr. Raney in two ways. First, he says that, upon the evidence, Lobb had put far more money into the trust property than he had received, and he was therefore entitled under the terms of the trust to borrow to recoup himself, and that what he did was to borrow from Foster for that purpose. The fact that the money was taken from Foster in the first instance without his consent is something that concerns

Foster and Lobb alone, so long as there was more due to Lobb than the amount of the mortgage.

In the second place, Mr. Raney makes the alternative contention that, Lobb having advanced more money upon the trust than received by him, he had a lien upon the trust property for the balance due to him, and that his mortgage to Foster would at least operate as an assignment *pro tanto* of this lien. The difference in the result would be that in this case Foster's sole remedy would be to have his lien enforced by sale rather than by foreclosure.

Mr. Jennings takes the position that the assignment must be regarded as an assignment under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, and that therefore the assignee had no right to do anything without first calling a meeting of creditors, having inspectors appointed, and then acting in all respects in conformity with that Act.

I do not so understand the law. The assignment is clearly not one under the statute, as the powers which it confers upon the assignee are totally different. An assignment under the statute is an assignment to realise and sell; the intention under this assignment was that the assignee should be a trustee for the purpose of building houses and then selling, with the incidental power of borrowing money. It may be that the creditors could have attacked this assignment or that it would have been superseded by an assignment in conformity with the Act; but it is to be borne in mind that the creditors have not attacked it, and that the Trusts and Guarantee Company is now the trustee under the assignment, and it cannot seek to defeat its own title.

Nor do I find anything in the statute which gives colour to Mr. Jennings' alternative contention that the assignment is to be so read as embodying in itself all the terms of the Assignments and Preferences Act.

It is conceded that there was very little margin in the property covered by the mortgage in question over and above the amount of prior incumbrances, including mechanics' liens; and, this being so, I feel inclined to give effect to Mr. Raney's first contention and to uphold the validity of his mortgage, as a mortgage, and to grant foreclosure. If the defendant is ready to consent to an immediate foreclosure, then, the plaintiff taking the property for the debt, I need not consider the question of costs; but, if this is not

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consented to, I think there should be foreclosure according to the ordinary practice, and in that event the defendant company, having contested the plaintiff's rights, must be ordered to pay the costs to the hearing.

The defendant company appealed from the judgment of MIDDLETON, J.

November 24, 1915. The appeal was heard by GARROW, MACLAREN, MAGEE, AND HODGINS, JJ.A.

J. Jennings, for the appellant company. The conveyance in trust to the mortgagor was in effect an assignment for the general benefit of creditors within the meaning of sec. 9 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, and so the mortgage was void without the consent of the creditors: *Morrison v. Watts* (1892), 19 A.R. 622, at pp. 631, 633; *Alexander v. Wavell* (1884), 10 A.R. 135; *O'Brien v. Clarkson* (1884), 10 A.R. 603; *Jennings v. Moss* (1884), 10 A.R. 696. The mortgage in question was, therefore, an act *ultra vires* the trustee, and not binding upon the trust property. In any event, a trustee cannot mortgage to himself; and the plaintiff's money, not having been expended for trust purposes, his mortgage, at the highest, could only be in the position of a mortgage from Lobb as trustee to himself personally: *Ex p. Lacey* (1802), 6 Ves. 625; *Gibson v. Jeyes* (1801), 6 Ves. 269, at p. 277; *Whichcote v. Lawrence* (1798), 3 Ves. 740; *Underhill on Trusts*, 7th ed., p. 315. A trustee can establish no claim to reimbursement where he has incurred outlay not in the strict line of his duty, and without either the request or the implied assent of his *cestui que trust*: *Lewin on Trusts*, 12th ed., p. 800. The plaintiff cannot stand in any higher position than Lobb: *Collinson v. Lister* (1855), 20 Beav. 356. The defendant, being a trustee, should be relieved from costs: *Fisher v. Fisher* (1898), 25 A.R. 108.

W. E. Raney, K.C., for the plaintiff, respondent. The Assignments and Preferences Act does not apply at all to the trust deed, the object of which was the placing in the hands of Lobb uncontrolled powers of completing and selling the houses. Under the Act, Lobb would have been controlled by the creditors. The expenditure benefited the property. The arrangement was approved by the Ellensons' creditors, expressly or tacitly.

Jennings, in reply.

January 24, 1916. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendant from the judgment at the trial before Middleton, J., in favour of the plaintiff.

The action was brought to enforce by foreclosure a mortgage dated the 10th September, 1914, made by Mr. Arthur Freeman Lobb in favour of the plaintiff, upon certain lands in the city of Toronto, to secure \$5,980 and interest.

The facts are quite fully set out in the judgment of Middleton, J., and, except in minor matters, are not in serious dispute. The execution of the mortgage is admitted, so is the execution of the conveyance in trust from the debtor to the trustee, Arthur Freeman Lobb. It is not disputed that the trustee received for the plaintiff the sum of money to secure which the mortgage in question was, about three months afterwards, given; nor is it disputed, or, if so, but faintly, that at that time the advances which the trustee had personally made, without security, to the trust estate, considerably exceeded the sum for which the mortgage was afterwards given.

The main contention by the learned counsel for the defendant before us, as previously, apparently, before Middleton, J., was, that the conveyance in trust to the mortgagor was in effect an assignment for the general benefit of creditors within the meaning of sec. 9 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, and that the mortgage was therefore ineffectual without the consent of the creditors or of inspectors appointed by them.

He also contended that it is not established that the trust estate benefited by the plaintiff's money; and if by that is intended merely a statement that it is not proved that the money received from the plaintiff by Mr. Lobb was actually expended in and upon the trust property, I would be disposed to agree. Mr. Lobb, carelessly perhaps, or at least I may be allowed to be critical to the extent of saying, unwisely, kept but the one bank account. He was evidently a busy man, engaged in many affairs. His cash-book shews that he constantly handled large sums of money. Yet he kept but the one bank account, into which indiscriminately went his own and his clients' money, and upon which he drew by means of cheques as money was required.

The result renders it not easy to trace, at this late date, exactly what became of the plaintiff's money received by Mr. Lobb

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in June, 1914; nor is it, I think, necessary, or even useful, to do so, since the defendant quite fails, by any reference to the evidence, to displace the important finding by Middleton, J., upon the state of the account in this matter, in these words: "Mr. Lobb left the Province, and was examined under commission in New York. Upon his examination he states that the trust owes him at least \$25,000. Upon the trial various statements were made reflecting upon the accuracy of these figures, but they were not seriously impeached."

With that finding standing, and fraud and bad faith entirely out of the question, it seems idle to talk about whether or not the plaintiff's money was actually expended upon the trust property. One must look at the substance, and not merely at the form. Mr. Lobb's power and his duty, as defined in the trust deed, was to complete the houses in course of erection, and for that purpose to borrow money upon the security of the lands of the grantor *or otherwise*. And, under these circumstances, he might himself temporarily advance; and for any such advance he was certainly entitled to recoupment out of any loan which was obtained. And, looked at fairly, the giving of the mortgage now in question was therefore merely in effect recoupment *pro tanto*.

As to the other point, which I have before called the defendant's main contention, I also agree with the conclusions of Middleton, J.

Section 9 was first introduced in the statute of 1895, 58 Vict. ch. 23 (O.), and is as follows: "Every assignment for the general benefit of creditors, whether it is or is not expressed to be made in pursuance of this Act, and whether the assignment does or does not include all the real and personal estate of the assignor, shall vest the estate, whether real or personal or partly real and partly personal, thereby assigned, in the assignee therein named for the general benefit of creditors, and such assignment and the property thereby assigned shall be subject to all the provisions of this Act, and the same shall apply to the assignee named in such assignment."

The need for the amendment is said to have been because it had been held that an assignment of part only of a debtor's estate was not within the statute. See Cassels' Ontario Assignments Act, 4th ed., p. 71. I am not aware of any case in which its provisions have been considered.

It applies, as it says, to "every assignment for the general benefit of creditors." The trust set forth in the conveyance to Mr. Lobb is thus expressed: "Upon trust that the said grantee, his heirs, executors, administrators, and assigns, shall complete the houses in course of erection upon said parcels 1, 2, and 3, and for that purpose to borrow money upon the security of the lands of the grantor or otherwise, and sell and convey the real and personal property and convert the same into money, and collect and call in all debts, dues, and demands of the said Ellenson Lumber Company, and with the money so received: first, to pay the legal costs of and incidental to the preparation and execution of these presents; second, to retain for himself such remuneration as may be agreed upon; third, to pay preferential claims and liens; fourth, to pay the debts and liabilities of the grantor ratably and without preference or priority."

The controlling idea of the arrangement evidenced by the trust deed clearly was to place in the hands of Mr. Lobb the uncontrolled management of the work of completing and selling the partly finished houses, in which it was apparently believed would be found considerable profit, enough, it was hoped, to pay every one in full. That idea could not have been carried out by means of the usual assignment under the provisions of the statute, where the assignee is always completely under the control of the creditors. The creditors are not bound to accept the benefits, if any, intended for them under the trust deed in question. They might even conceivably attack it, I will not say successfully, as part of a fraudulent scheme for delay; but what they cannot, in my opinion, be allowed to do, is both to approbate and reprobate, which is what, by the mouth of this defendant—whose only right to be here at all is derived under the trust deed and the order of substitution—they are trying to do.

For these reasons, I would dismiss the appeal with costs.

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[APPELLATE DIVISION.]

COUNTY OF WENTWORTH V. HAMILTON RADIAL ELECTRIC
R.W. CO. AND CITY OF HAMILTON.

Highway—Toll Road Acquired by County—Abolition of Tolls—Toll Roads Expropriation Act, 1901—County Road—Annexation of Township Territory to City—Inclusion of Portion of Road—Order of Ontario Railway and Municipal Board—Vesting of Portion of Road in City—Powers of Board—Mileage Payments Agreed to be Made by Electric Railway Company to County—Transfer to City—Arbitration Provisions of Municipal Act.

It was held, by the majority of the Court (reversing the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 659), that the only notice required to be given by the statute in force when (27th September, 1909) the order of the Ontario Railway and Municipal Board was made, viz., notice to the adjacent township (8 Edw. VII. ch. 48, sec. 1), having been duly given, the Board had jurisdiction to make the order. The portion objected to as *ultra vires* was contained in the last two lines of clause 5—"all former toll roads purchased by the said county in the annexed territory shall vest in the City of Hamilton." The most that could be claimed by the plaintiff corporation was compensation in respect of the portion of the highway in the annexed territory, especially in respect of the money payable under the agreement with the railway company, upon which the action was based. That, agreement, however, was entirely based upon a mileage rate; the effect of the annexation was to shorten the mileage in the county upon which the railway company agreed to pay; and, unless the annexation itself, which transferred the road from the county to the city, was to be overturned, the plaintiff corporation could not recover in this action.

Semble, that the plaintiff corporation might be entitled to a remedy under the provisions respecting arbitration contained in the Municipal Act.

Per HODGINS, J.A. (dissenting):—The question raised was whether the plaintiff corporation was entitled to collect the mileage payments under its agreement with the railway company—the defendant city corporation claiming to be entitled to the payments for the portion of the road included in the city, by reason of the annexation of territory including that portion. If the mileage payments were not divisible, the right of the granting municipality to receive what it had stipulated for could not be taken away. The mere annexation of the territory, including the road, did not deprive the county of a rental or of a payment for which it gave full value when it was in a position to do so. The shifting of municipal jurisdiction does not annul existing franchise agreements, although it prevents additions or alterations without the consent of those who for the time being have power over the highways.

Re City of Toronto and Toronto and York Radial R.W. Co. (1913), 28 O.L.R. 180, and in the Privy Council (1913), 25 O.W.R. 315, referred to.

The plaintiff corporation purchased the road, and abolished the tolls; the Toll Roads Expropriation Act, 1901, then operated to make the road a county road, and the proprietary interest of the plaintiff corporation ceased.

The words of the order purporting to "vest" the road in the defendant city corporation are beyond the powers of the Board if they mean anything more than what was effected by the operation of the Municipal Act, or if it was intended thereby to deal with any property or assets of the plaintiff corporation which might be the subject of arbitration.

The moneys paid by the railway company to the city corporation could not be recovered.

APPEAL by the defendant the Corporation of the City of Hamilton from the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 659.

December 10, 1915. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

H. E. Rose, K.C., and *F. R. Waddell*, K.C., for the appellant corporation, argued that, the territory in question being annexed to the city, the roads became vested in the city corporation, and the corporation was entitled to an apportionment under the Landlord and Tenant Act. The learned trial Judge gave a wrong interpretation to the term "county road," thinking that it meant an asset of the county. The annexation of the territory transferred the road. They referred to the Municipal Act, 1903, secs. 56, 58; 6 Edw. VII. ch. 54, sec. 1; 8 Edw. VII. ch. 48, sec. 1; 6 Edw. VII. ch. 31, sec. 53; 1 Edw. VII. ch. 32, secs. 5, 6, 9; 5 Edw. VII. ch. 27, sec. 4; 1 Edw. VII. ch. 33, secs. 2, 3, 9; 2 Edw. VII. ch. 35; Municipal Act, 1903, secs. 613, 614, 615, 616; sec. 27, sub-sec. 6; secs. 65, 335, 600; Municipal Act, 1913, secs. 434, 446.

G. Lynch-Staunton, K.C., and *J. L. Counsell*, for the plaintiff corporation, respondent, referred to R.S.O. 1877, ch. 152, p. 1351; C.S.U.C. ch. 49, p. 466. This was a lawful toll road, and it was sold to the plaintiff corporation, which abolished tolls in 1902. The plaintiff corporation has rights in the road and ownership of it. The statute gives it a right to take and to sell the road, and overrides everything. The city gets only the township's rights, not the county's. Arbitration does not apply to this case—under sec. 58 of the Act of 1903, only debts are to be arbitrated on. We contend that no valid order has been made; and that, even if an order has been validly made, there is no power in the Board to take private property.

D. L. McCarthy, K.C., for the defendant railway company, contended that the Municipal Act of 1913 settled the whole matter, and referred to sec. 433.

Rose, in reply.

January 24. GARROW, J.A.:—Appeal by the Corporation of the City of Hamilton from the judgment at the trial, without a jury, of Meredith, C.J.C.P.

The case is fully reported in 31 O.L.R. 659, where all the facts appear.

As will be seen, the judgment rests upon the proposition that the Ontario Railway and Municipal Board had no authority to

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make an order transferring that portion of the county road in question which passes through the annexed territory from the county to the city. The order is intituled "In the matter of the application for the annexation to the City of Hamilton of certain lands in the Township of Barton more particularly described in the resolution passed by the Municipal Council of the Corporation of the City of Hamilton on the 30th day of August, 1909." And it professes to have been made "upon the application of the said applicants made on the 27th day of September, 1909, and upon reading the petition of the said applicants and the resolution of the Council of the Corporation of the City of Hamilton passed on the 30th day of August, 1909, and upon hearing what was alleged by counsel on behalf of the said applicants and other ratepayers of the said township, the Corporation of the City of Hamilton, and the Corporation of the Township of Barton."

The order contains sixteen clauses and fills over five pages of closely printed matter, dealing with and determining a variety of subjects arising upon the separation. The portion objected to as *ultra vires* is contained in the last two lines of clause 5, the whole clause being as follows: "5. The City of Hamilton shall pay to the Township of Barton, on the 14th day of December, 1910, and thereafter annually during the currency of the good roads debentures issued by the County of Wentworth, the amount which would have been levied upon the said property to be annexed, in respect of such debentures, if the said lands had remained part of the Township of Barton, and were assessed each year at the amount said lands were assessed for the year 1909, and a rate were struck each year at the same rate as fixed by the Township Council of Barton for the year 1909, and all former toll roads purchased by the said county in the annexed territory shall vest in the City of Hamilton."

The time fixed by the order as that at which it should come into effect was the 1st day of November, 1909, and it apparently has been acted upon ever since by the two municipalities of the City of Hamilton and the Township of Barton. So far as the mere words themselves in clause 5 are concerned, I agree with the contention of Mr. Rose, counsel for the city, that they are mere surplusage and add nothing to the general provision annexing the territory to the city, which *ipso facto* transferred the

jurisdiction over the highway from the county to the city. That, however, does not go quite to the bottom of the objection made by the county, which is, that the county was entitled to notice and to an adjudication by the Board upon any claim it had in respect of the road. The only notice required to be given by the statute in force when the order was made was notice to the adjacent township: see 8 Edw. VII. ch. 48, sec. 1; and that notice was duly given. That has since been changed, and now, by R.S.O. 1914, ch. 192, sec. 21, notice to the county must also be given. The proceedings are purely statutory. Whatever may be the nature of the claims of the county or the consequences to it flowing from the order, it seems to me that, the statutory notice having been duly given, there is an end to any question going to the jurisdiction of the Board to make the order. It is not like the case of private rights or private litigation. The Board stands in many respects in such a matter in the place of the Legislature, and the consequences of the order are to be considered very much as if a statute had been passed making the annexation which the order authorised.

And, if the Board had jurisdiction to make the order, omitting the objectionable words, or rather the words objected to, I cannot see how the judgment can be supported. Jurisdiction over a highway locally situated in another municipality cannot be and is not claimed. All that can be or perhaps is claimed is, that the county was entitled to some compensation in respect of the portion of the highway in the annexed territory, especially in respect of the money payable under the agreement with the railway company, upon which the action is based. That agreement, however, is entirely based upon a mileage rate. The effect of the annexation is to shorten the mileage in the county upon which the railway company agrees to pay; and, unless the annexation itself, which transfers the road from the county to the city, is to be overturned, the plaintiff cannot, in my opinion, recover.

It is not, in my opinion, necessary to discuss at any length and especially not to pronounce any final opinion upon what claim, if any, the county really has. It loses the mileage rate, but it is also relieved from all charges for maintenance and repair. If the claim is based upon money expended to get rid of the tolls and acquire control of the road as a county road, that seems to

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be all in the past and to have been adjusted, and its share apportioned to the Township of Barton, and the proportion of the part of the township annexed carefully preserved and secured by the provisions of clause 5, before set out. But, whatever the nature of the claim may be, it must, I think, be asserted elsewhere, and cannot assist the plaintiff in maintaining this action. Relief may perhaps be found, as counsel for the appellant suggests, in the provisions respecting arbitration contained in the Municipal Act, which seems to have been carefully drawn to prevent injustice being done in the case of claims of this nature arising on the alteration of boundaries between municipalities. See sec. 58 of the Consolidated Municipal Act, 1903.

For these reasons, I would allow the appeal with costs, and dismiss the action with costs.

The money in Court should be paid out to the defendant the City of Hamilton.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—I agree.

HODGINS, J.A.:—The question raised by this case is, whether the County of Wentworth is entitled to collect the mileage payments under its agreement with the Hamilton Radial Electric Railway Company. The defence raised by the City of Hamilton is, that, by reason of the annexation of territory including part of the road upon which the railway runs, the city became entitled to the payment for that portion, and not the county.

The annexation order was made by the Ontario Railway and Municipal Board in 1909, and the action has been decided (see 31 O.L.R. 659) upon the point that the words of the order, "all former toll roads purchased by the said county in the annexed territory shall vest in the City of Hamilton," are *ultra vires*.

When the county decided to abolish tolls on the road in question, it proceeded by arbitration under 1 Edw. VII. ch. 33, as amended by 2 Edw. VII. ch. 35.

By the latter, under sec. 6, the road, when freed from tolls, became a "county road within the meaning and provisions of the Municipal Act."

Upon the annexation, the jurisdiction of the City of Hamilton attached over the part of the road within the portion annexed, but the township and county by-laws relating to roads and streets continued in force until altered by the city (3 Edw. VII. ch. 19, sec. 56).

The agreement between the county and the radial company was made on the 19th day of June, 1905, and contained the following stipulation as to payment:—

“For the privileges hereby granted, the company shall pay to the Corporation of the County of Wentworth yearly, at the commencement of each year, at the rate of \$50 per mile or *pro ratâ* for portion of a mile per year for the first three years, and after the expiration of the first three years at the rate of \$100 per mile or *pro ratâ* for portion of a mile per year for the next five years, and at the rate of \$200 per mile per year thereafter for every mile or *pro ratâ* for portion of a mile of railway operated on the said county roads under this by-law. First payment to be made on the 1st day of January, 1907.

“Time to be of the essence of the contract. And, unless the payments provided for be made within thirty days after they become due, all the rights and privileges granted under this by-law shall cease.”

The case raises a very important question. If the suggestion made at the hearing, that the mileage rate is divisible, is not accepted, the point involved is the right of a municipality to collect rental or a portion of the consideration under a franchise contract after part of the road has, through annexation, ceased to be under its jurisdiction.

But, if it is not divisible, I see no reason for doubting that, except by legislation, the right of the granting municipality to receive what it has stipulated for cannot be taken away. The fact that, after the franchise was granted, other interests succeeded to the municipal jurisdiction over the street, is no new thing, as is seen in the cases of *Toronto R.W. Co. v. City of Toronto*, [1906] A.C. 117, *Re City of Toronto and Toronto and York Radial R.W. Co.* (1913), 28 O.L.R. 180, and, in appeal before the Judicial Committee, *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315, and *Toronto Electric Light Co. v. City of Toronto* (1915), 33 O.L.R. 267, to say nothing of numerous other known instances not resulting in litigation.

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The annexing municipality takes the territory with the burden already placed upon it. It is generally the active mover in the matter; but, if not, its objections can be heard before an order is made. It is often the case that provision is made by legislation for the benefit to go with the burden. In the case of a street, there is no direct benefit unless it be a toll road or one on which a franchise is valuable, but the annexing municipality gets other value for whatever liabilities it comes under in regard to the street by getting the taxes from property whose assessment is based largely upon access and convenience.

This agreement grants privileges over the whole road, and it is for those privileges that the railway company has agreed to pay. The contract was made while the county had jurisdiction over the whole road, and when it was a county road.

The privileges are set out in the by-law, which is similar to those in other counties, and deals with the street railway, its equipment and schedules of time and routes; the road, in short, as a whole, and not in sections.

The railway company, having got those privileges, agreed to pay a certain definite yearly sum "for every mile of railway operated on the said county road(s) under this by-law." Now the railway is still operated on the "said county road." This is not meant as its description from a legal, but from a geographical, point of view, and it is further defined in the by-law as "hereinafter designated" and "hereinafter described," and is there set out with its termini. I think that, notwithstanding the annexation and its effect, the railway continues to operate on the same stretch of highway, and that its right to be there, which the city cannot disturb, is something for which it has agreed to pay the county a sum calculated on the then mileage of the highway, irrespective of its subsequent ownership, and in default of the payment of which it forfeits its rights and privileges. Annexation does not affect this obligation nor impair the right of the county to receive the consideration. But what seem to me conclusive on this point are the concluding words, "*under this by-law.*" There is no doubt that the operation is still under that by-law. It has not been, and probably cannot be, revoked: and, while it exists and the railway company runs its cars by virtue of the privilege which the by-law grants, the county must be entitled to

receive the rental. The mere annexation of the territory, including the road, could not deprive the county of a rental or of a payment for which it gave full value when it was in a position to do so. The shifting of municipal jurisdiction does not annul existing franchise agreements, although it prevents additions or alterations without the consent of those who for the time being have power over the highways.

It would be an extraordinary thing if part of the consideration for a benefit properly granted by the county, one which cannot be interfered with by the city, should become payable to the latter by an order which only operates to delimit municipal jurisdiction, and is made without any notice to the loser thereby.

The continuation of these franchises is expressly recognised in 1913, by 3 & 4 Geo. V. ch. 43, sec. 33, but that amendment only put in words what the law already was: *Alexander v. Village of Huntsville* (1894), 24 O.R. 665. Indeed, by 6 Edw. VII. ch. 30, sec. 216, the effect of a transfer of jurisdiction or ownership of a road is dealt with, and by that section the municipality to which the territory is annexed acquires rights to enforce the stipulations in the agreement for its own protection. But it does not get a share in the rental or acquire a right of property.

There is really nothing anomalous in one municipal body receiving, after the road has passed from its jurisdiction, rental or percentages for franchises which it granted when able to do so. The succeeding municipality takes subject to the existing right or franchise, and the grantee of the privilege continues to pay the agreed consideration. That has nothing to do with the jurisdiction over, or even the ownership of, the road itself, which may well pass subject to the earlier right. If in this case the county had paid the \$24,000 to free the roads from tolls, in the confident belief that that expenditure would be repaid by the sale of a street railway franchise, and had carried out that idea in the agreement now before the Court, there would be a strong element of injustice in depriving it of part of the road and part of the income thus ear-marked by annexation, without compensation, and even without notice.

If the consideration be a lump sum paid for all time or a yearly amount, or if it be so expressed as to prevent any division of it on the principle of proportion to parts of the road, the difficulty is intensified of dealing with it in the way suggested.

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I have been unable to find anything in the statute law that requires or allows a division of the consideration, unless it is found in the arbitration sections; and the attention of the Legislature might well be directed to the subject, so as to prevent injustice and embarrassment in case of a perpetual franchise or where the burden might prove unreasonably heavy.

In the case of *Re City of Toronto and Toronto and York Radial R.W. Co.*, 28 O.L.R. 180, reported, in the Privy Council, in 25 O.W.R. 315, *sub nom. Toronto and York Radial R.W. Co. v. City of Toronto*, the Judicial Committee dealt with a somewhat similar situation regarding Toronto. The city in 1888 annexed a part of Yonge street on which the railway was operating, under an agreement with the County of York. On p. 320 of 25 O.W.R. it is said: "The line of the appellants in the portion of Yonge street which, ever since 1st January, 1888, has been within the city of Toronto, has been held and operated by the appellants or their predecessors, under and by virtue of the franchise and privileges obtained by them under the agreements of 25th June, 1884, and 20th January, 1886. It is true that these agreements were made with the County of York (within whose jurisdiction this portion of Yonge street then lay), and not with the City of Toronto, but by the indenture of 20th August, 1888, the County of York conveyed to the City of Toronto the whole of its interests in the portion of Yonge street within the city. It is not necessary to decide whether, under the circumstances, the Corporation of Toronto became formally the successors of the County of York under the agreement, so far as it related to this portion of the track, to such an extent that they could have enforced obedience to the terms of the agreement by proceedings in their own name, because, even if that were not so, the County of York were clearly trustees on behalf of the Corporation of Toronto of their rights under these agreements with regard to such portion of the track, and could not have released the appellants from any of its conditions, otherwise than by the request or with the consent of the Corporation of Toronto. The appellants are thus bound by the whole of the obligations of those agreements, so far as they relate to such portion of the track. As has already been said, there has been no statutable release from those obligations, and it is clear, beyond the necessity of argument, that, if those obligations still exist, the proposed new line is not in conformity with them."

Their Lordships had previously, in reference to the two agreements mentioned in the passage just quoted, said (p. 317): "It is solely under the two agreements above referred to that the Metropolitan Street Railway Company of Toronto acquired, and that their successors, the present appellants, possess, the right to maintain and operate the street railway along the portion of Yonge street to which this case relates, and they are bound, in respect of such privilege and franchise, by all the terms and conditions of such agreements. Very numerous Acts of Parliament (being either general Railway Acts, relating to all railways in the Province, or special Acts relating to the appellant company or companies of which it is the successor), were cited in the argument, but their Lordships are unable to discover in any of such Acts any legislative provision which exempts the appellants from the performance of the conditions of the agreements under which they have obtained these privileges and franchises which they still enjoy."

It may be noted in passing that the City of Hamilton has no conveyance from the county nor any transfer of the interests of the county in the portion of the road within the annexed section, as the City of Toronto had.

I am, therefore, of opinion that annexation alone does not disable the county from collecting the payment under the agreement. If a road is, at the time of annexation, a toll road or one which is revenue-producing, either by reason of a railway, telephone, telegraph, electric light, or power franchise, its acquisition, and with it the right to the benefit of the agreement, becomes naturally a question of property, and not of jurisdiction only.

It is in this view that the words in the order of the Ontario Railway and Municipal Board are said to be important, for the City of Hamilton asserts a right to a section of the road and to the payments attributable to that section, based on mileage, not only by virtue of the annexation itself, but upon the order vesting the road in it.

This claim has in fact nothing to support it, because, even if the road is vested in the city, no contract to pay it has been alleged or proved, and none can arise from the mere annexation, nor from these words without more; so that the matter has to be viewed as a defence by the railway company to the claim for

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payment, there not being anything in evidence to justify a judgment declaring the city entitled to anything.

The county sets up three claims to an interest in the road, the existence of any one of which, it alleges, makes it unjust for the Board to have made the order in the words objected to. One is an interest under the Road Companies Act, of which it has a conveyance from the road company; the next is its right to the rental reserved in the agreement with the railway company; and the third is a right to receive from the city a larger proportion of the debt incurred in freeing the whole road from tolls.

I am satisfied that the road company, which conveyed to the county on the 6th November, 1902, had a title to the road capable of being vested in the county and giving it an interest unaffected by the statutory provisions dealing with the soil and freehold of the highway. The General Road Companies Act, C.S.U.C. ch. 49, sec. 3, and, later, R.S.O. 1877, ch. 152, sec. 3, provided that companies might be formed "for the purpose of constructing . . . in, along or over any public road or highway or allowance for road . . . a plank, macadamized or gravelled road."

Power to construct this was given, and its sale authorised (R.S.O. 1877, ch. 152, sec. 63); and, if a municipality bought it, it thereafter held it for the use and benefit of the locality, with all the powers and authority possessed by the company. That sale, by sec. 65, is to be "deemed to have passed and to pass such roads . . . to the purchaser or purchasers thereof, with all the rights, privileges and appurtenances."

By sec. 64, a municipality might "sell any work or macadamized, plank, or other toll road which they have constructed or purchased."

In *Regina v. Corporation of Paris* (1862), 12 U.C.C.P. 445, Draper, C. J., says that the statutory toll road in question was "vested in the defendants." In *Regina v. Corporation of Louth* (1863), 13 U.C.C.P. 615, John Wilson, J., speaks of it, not as a road belonging to the county, as a county road, within the statute, but as one acquired by the county as the assignees of a road company. In *Wellington Corporation v. Wilson* (1864), 14 U.C.C. P. 299, at pp. 305-7, Adam Wilson, J., says the plaintiffs might purchase a road and might become the absolute proprietors of a bridge by purchase from a road company. See also *Payne v.*

Caughell (1897), 24 A.R. 556, the case of a toll road conveyed by the Crown to a county, and by it sold to an individual.

The effect, however, of the Toll Roads Expropriation Act, 1901, 1 Edw. VII. ch. 33, and its amendments, and the Improvement of Public Highways Act, 1901, 1 Edw. VII. ch. 32, seems to leave in some doubt the exact position of this road after the tolls were abolished in 1902. Until that was accomplished, the county was undoubtedly possessed of a proprietary interest in the road. It became by statute, on the abolition of tolls, a county road. The county was not bound to abolish the tolls; it might and did purchase the road; but its own by-laws, the Expropriation Act, and the fact that it used moneys derived under the Improvement of Public Highways Act, which it could only properly do in abolishing tolls, lead me to the conclusion that its proprietary interest ceased when the statute operated to make it a county road.

Upon the second head of claim I have already given my views.

As to the third head, no evidence was produced, and it is impossible to say whether the claim is one which exists and is enforceable in fact or not. The fact that some of the minor municipalities might be unduly burdened with the cost of freeing highways from tolls, is recognised and dealt with in the Toll Roads Expropriation Act, 1901, by secs. 9 and 10, as amended in 1902; it allows the county to give a bonus to those townships which are only slightly benefited, to offset the tax. It is not shewn whether this has been done or not. But, if either of these claims (first and third) can be made out, do the words in question operate to embarrass the county? Are they *ultra vires* or mere surplusage? The words are, "shall vest in the City of Hamilton," and the order is dated the 27th September, 1909.

At that date, the provisions of the Municipal Act, 1903, secs. 599 and 601, were operative. By the former, unless otherwise provided for, the soil and freehold of every highway, etc., was vested in the Crown. This, from a perusal of the cases relating to road companies which I have quoted, must be limited to that part of the road other than that in which the road company had an interest. By sec. 601, every public road, etc., in a city, town, village or township, was vested in the municipality, but that was likewise so subject. A county road, though not defined in the Municipal Act, is one over which the county council has ex-

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clusive jurisdiction. It was pointed out in 1865, and I think still holds good, that the reason why jurisdiction over as opposed to ownership of certain roads is conferred on a county, is because it has no peculiar or exclusive locality constituting it apart from the separate municipalities which comprise it, and to vest the road in the county would be inconsistent with vesting it in the separate municipalities: per Adam Wilson, J., in *Wellington Corporation v. Wilson* (1865), 16 U.C.C.P. 124. Unless, therefore, it can be shewn that the title derived from the road company survived the abolition of tolls, I cannot see upon what the words objected to would operate unless upon the interest of the township. No doubt, there is a special and limited property in the county in a county road, as explained by the case just cited; but, as that interest only existed for purposes which would cease to interest the county after annexation, it is hardly worth considering at the present time.

The words objected to do not, therefore, in my opinion, divest the county of anything which the Legislature has not already divested, unless possibly the proprietary interest under the Toll Roads Act; and that, I think, has disappeared. At the same time, I have been unable to find any right or jurisdiction in the Ontario Railway and Municipal Board to make an order in the terms objected to. The county has the right to raise all these questions as matters of compensation under the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 58; and, while these words may here, and for the purpose of determining the rights to the moneys claimed, be rejected as surplusage, they should not be allowed to remain so as to be available again to embarrass the county in that proceeding.

I have gone carefully over the provisions of the various statutes cited, to ascertain just what the powers of the Board are in such a case as this. The jurisdiction of the Board in 1909 in this matter was that conferred in 1906 by 6 Edw. VII. ch. 31, sec. 53, *i.e.*, of exercising the powers conferred upon the Lieutenant-Governor in Council under the Municipal Act, as to the addition to or taking from any territory, the annexation of any territory to any city or town, and the alteration in any manner of the boundaries or limits of any municipality. When that Act came into operation on the 1st June, 1906, the powers to be so exercised

were defined in 6 Edw. VII. ch. 34, sec. 1 (assented to on the 14th May, 1906). Under that, legislative power was given to proclaim annexation "upon such terms and conditions as to taxation, assessment, improvements or otherwise as may have been agreed upon or shall be determined by the Lieutenant-Governor in Council."

Those powers remained as originally stated in 1906, until 1913, when sec. 53 of 6 Edw. VII. ch. 31 disappeared, and the sections already referred to became sec. 21 of 3 & 4 Geo. V. ch. 43. This latter provided for notice to the county council where it was proposed to make an addition to a city or separated town.

The terms and conditions of annexation might, therefore, if not agreed upon, be determined by the Board in so far as they related to (1) taxation, (2) assessment, (3) improvements, (4) or otherwise. There is no provision as to settlement of the debts or payment for the assets of the respective municipalities concerned.

At the time the Ontario Railway and Municipal Board was constituted and these powers conferred upon it, there existed in the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 58 (1), a provision for arbitration which included in its purview the county as well as the township, and covered compensation for debts assumed and payment for property and assets.

This seems to cover and include the situation which existed after annexation until 1913, when, by sec. 38 of 3 & 4 Geo. V. ch. 43, new provisions, sub-secs. 3 and 4, were made, dealing with such a case as this. I am not able to accept the view that the notice prescribed in 1908 enabled anything to be done which affected the county, if it was not notified. The prescribed notice was intended to prevent annexation going on without formal notice to the municipality whose territory was being dealt with. But it does not absolve the parties from giving that notice which is the invariable and indispensable preliminary to affecting the rights or property of an individual or a corporate body. See *Nicholls v. Cummings* (1877), 1 S.C.R. 395; *Bartlet v. Delaney* (1913), 29 O.L.R. 426.

Viewing these provisions, I find nothing to indicate that the Board had anything to do with the assets of any of the corporations affected, and certainly not with any county assets, for the county was not notified. The thing the Board intended to do in

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WENTWORTH
v.
HAMILTON
RADIAL
ELECTRIC
R.W. Co.
AND
CITY OF
HAMILTON.
—
Hodgins, J.A.

this case was to annex a district and settle questions of assessment, taxation, improvements (local or general)—see 3 Edw. VII. ch. 19, sec. 58 (2), and the sections mentioned therein—or any subjects which naturally arise from the transfer of the rights of municipal government from one set of elected representatives to another, as well as the question of jurisdiction. The difference in the assets and liabilities and the value of the former are generally, in our municipal system, left to arbitration. Both the Municipal Act and the Public Schools Act contain many instances of this principle.

I regard the words of the order purporting to “vest” the road in the City of Hamilton as entirely beyond the powers of the Board, if they mean anything more than what the Municipal Act did, or if it is intended to deal with any property or asset of the county which may be the subject of arbitration. I agree that the moneys paid cannot be recovered.

I would affirm the judgment and dismiss the appeal with costs.

Appeal allowed; HODGINS, J.A., dissenting.

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[APPELLATE DIVISION.]

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Dec. 30

RE SOVEREIGN BANK OF CANADA.

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CLARK'S CASE.

Jan. 24

Banks and Banking—Winding-up of Bank—Contributory—Double Liability—Bank Act, sec. 125—Shares Purchased for Infant—Contract—Ratification after Majority—Receipt of Dividends—Knowledge—Laches and Acquiescence—Appeal—Leave—Winding-up Act, sec. 101.

Paid-up shares of the capital stock in a bank were purchased by the father of C., an infant, and placed in her name. Dividends upon the shares were received from time to time, and, with other moneys, placed to the credit of an account opened in her name in the bank. On the 20th January, 1908—she being still an infant—there was a balance to her credit, which was transferred to an account opened in her name in another bank, the original bank being in difficulties. In December, 1913, an order for the winding-up of the original bank was made, under the Dominion statute. For some years previously, a winding-up had been going on outside of the statute. Upon her account transferred to the other bank, C., in October, 1913, being then of full age, drew a cheque, which was paid by the bank. The money in the bank upon which she drew was, in part at least, made up of the dividends which had been credited to her account. She did not repudiate or disaffirm her contract in respect of the shares until, in the winding-up, the liquidator sought to make her a contributory for “double liability” under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29:—

Held, that C. was, on the ground of laches and acquiescence, liable as a contributory in respect of the shares standing in her name.

Per MEREDITH, C.J.O., GARROW and MAGEE, J.J.A., and RIDDELL, J., that there was a distinct affirmation or ratification of C.'s apparent position of shareholder, by the withdrawal of the money in the bank after she had attained her majority—money which she must have known represented the accumulated dividends upon the shares; MACLAREN and HODGINS, J.J.A., *contra*.

Decision of RIDDELL, J., affirmed.

Per MIDDLETON, J., granting leave, under the Winding-up Act, R.S.C. 1906, ch. 144, sec. 101, to appeal from the order of RIDDELL, J., affirming the placing of C.'s name on the list of contributories:—An appeal should be permitted where there is reasonable ground to suppose that the would-be appellant may obtain relief by further appeal, and a prolongation of the litigation cannot be regarded as vexatious.

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APPEAL by Muriel I. Clark from an order of an Official Referee, made in the course of a reference for the winding-up of the bank, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, confirming the placing of the name of the appellant upon the list of contributories in respect of her "double liability" upon shares standing in her name, under the Bank Act. The liquidator also appealed from the order of the Referee refusing to make A. D. Clark, the father of Muriel I. Clark, liable upon the shares.

December 8, 1915. The appeals were heard by RIDDELL, J., in the Weekly Court at Toronto.

George Kerr, for Muriel I. Clark.

Joseph Montgomery, for A. D. Clark.

J. W. Bain, K.C., and *M. L. Gordon*, for the liquidator.

December 11, 1915. RIDDELL, J.:—In the office of the Official Referee in the winding-up proceedings, Miss Muriel I. Clark was placed on the list of contributories in the Sovereign Bank of Canada for $5\frac{1}{4}$ shares; she appeared and gave evidence, and her name was struck out of the list; thereafter certain facts came to light shewing that her evidence, while no doubt truthful, was by no means all the truth, the case was reconsidered (no formal judgment having been taken out) and her name reinstated. This proceeding, which her counsel before me animadverted upon as most extraordinary, seems to me to be most just and wholly proper—precisely such as was the plain duty of the Referee.

She now appeals.

The appellant, born on the 6th December, 1890, was living with her father in Toronto; Mr. Stewart, the general manager of

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the Sovereign Bank, was a brother-in-law of Clark's; and Clark, believing that an investment in the bank's stock would be remunerative, bought for his daughter some shares, paying for them with his own money, but having the shares put in her name.

The following were the transactions:—

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1903, Dec. 31.	Transfer from Stewart "in trust"....	1 share
1904, Dec. 14.	" " " " " "	2 "
1905, June 3.	New stock allotted, May 8, 1905....	1 "
" " 13.	Transferred by H. D. Eby.....	1 "
1906, July 15.	New stock allotted Mar. 31, 1906....	2 "

In all 7 shares

1907, Aug. 12. The capital was reduced by 25% ... 1¾ "

Leaving in Miss Clark's name..... 5¼ "

It will be seen that during all this time Miss Clark was an infant: she did not know all the particulars—perhaps no particulars at all—but she knew she had some shares in the Sovereign Bank, as I should judge from her own evidence: "I think I knew—I knew I had some shares . . . I didn't know how many, but I knew I had some shares."

Dividends were declared from time to time; dividend cheques were issued and deposited to the credit of Miss Clark in the bank, apparently without communication with her. There is one exception in the cheques produced—the dividend cheque for the 16th August, 1907, for \$7, was paid on her endorsement, but in December, 1907, the previous custom was reverted to.

Other moneys were paid into this account, and on the 20th January, 1908, there was a balance to her credit of \$149.28—the bank had then got into difficulties, and the amount was taken out of the Sovereign Bank and deposited to the credit of Miss Clark in the Merchants Bank of Canada on the last named day—of this at least \$102.80 came from the dividends.

This account is still current; it consists of the original sum, \$149.28, with a few trifling deposits and interest declared and added from time to time: Miss Clark by cheque withdrew \$110 on the 4th October, 1913, leaving then in the account the sum of \$93.03, thereby receiving \$56.25 (at least) from the original

\$149.28, and consequently (at least) \$9.77 from the bank's dividends.

She was then of full age, and it is contended that this act was a ratification.

Miss Clark says that, shortly after she came of age, she was told that shares were bought by her father in her name; she knew that the money in the Merchants Bank "came from the Sovereign Bank;" her father told her that she "had some money in the Merchants Bank from the Sovereign Bank." She knew the meaning of "dividends," but didn't think she "bothered about dividends;" and, "no matter whether it came as a dividend from shares or not," she was "going to use the money when it was there for" herself; she "understood that this was some money that came from the Sovereign Bank in connection with these shares . . . some money connected with these shares that" her "father had bought in" her "name."

It seems to me that the only conclusion is that she knew or believed that the money came from her ownership of shares in the Sovereign Bank.

Before the Referee, her counsel took the position that the liquidator had no right to recover back the dividends, the argument being as follows:—

"7. The liquidator contends that, if Miss Clark is entitled to repudiate double liability, she should pay back the dividends she has received in respect of these shares; on the ground that, the contract being thus rendered void *ab initio*, she cannot retain any benefit under it.

"8. This principle might be applied if payment of dividends could have been considered as part of the original contract, as would be the case if she had made some deal with these shares and had received part payment. In such a case, if she repudiated the contract, she might be asked to pay back the money so received. Here the contract was complete when she paid for the shares in full, and the dividends she subsequently received were undoubtedly dividends subsequently earned by the bank by the use of her money; and, as she is making no claim to get her money back, the liquidator can have no claim to get back from her the profits earned with this money while she was an infant, and which have been paid over to her; the money, having been *bonâ fide*

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paid, cannot be recovered back: *Langley v. Van Allen* (1900), 32 O.R. 216; Smith's Leading Cases, 10th ed., vol. 2, p. 430."

The act of the appellant was an express ratification of the ownership of the stock, as it seems to me. Upon the argument before me, I asked Mr. Kerr if his client was willing now to pay back the dividends—after consulting the father, he gave a most reluctant consent that the money should be paid back, but insisted on his client's costs being paid (not, however, as a condition, as I understood it).

It is, to my mind, too clear for argument that receiving any part of the money made available by any proceeding, however irregular, is a ratification of that proceeding: *Clark v. Phinney* (1896), 25 S.C.R. 633; *Steen v. Steen* (1907), 9 O.W.R. 65, affirmed in the Court of Appeal, 10 O.W.R. 720.

The act of Miss Clark in knowingly receiving money, to which she was entitled only if she was the rightful owner of the shares, is, in my view, a ratification by a person after attaining majority of the acts done in her name when she was an infant—this is strengthened by the position taken before the Referee when she did not repudiate the ownership of the stock.

I think the appeal fails, and must be dismissed with costs.

In this view, the appeal for an order making the father liable on these shares also fails—I do not think this a case for costs.

Muriel I. Clark moved for leave to appeal from the order of RIDDELL, J.

December 22, 1915. The motion was heard by MIDDLETON, J., in Chambers.

George Kerr, for the applicant.

J. W. Bain, K.C., for the liquidator.

December 30, 1915. MIDDLETON, J.:—Motion for leave to appeal to the Appellate Division from the judgment of Mr. Justice Riddell dismissing the contributory's appeal from the order of the Master placing her upon the list.

The question appears to me to be one which justifies further consideration. Miss Clark, while an infant, had stock in the Sovereign Bank, purchased for her by her father. This was, no

doubt, intended by him as a gift to her. Seven shares were purchased between the years 1903 and 1906. The capital was reduced in 1907, so that her holdings became five and a quarter shares. While Miss Clark was yet an infant, the bank went into liquidation, a receiver being placed in charge. An arrangement was made by which certain other banks took over the customers' accounts where there was a credit balance. A small credit of about \$150 stood in Miss Clark's name, it is said, derived in part, at any rate, from dividends upon these shares. This amount was transferred to her credit in the Merchants Bank, and she drew it from that bank. It has been held that this amounted to such a ratification of the ownership of the shares that Miss Clark is now precluded from setting up her infancy as a defence to the double liability upon the stock in her name.

No doubt, in ordinary cases, an infant is called upon to repudiate within a reasonable time after attaining majority: *Edwards v. Carter*, [1893] A.C. 360; but, where the liability is statutory and does not arise from an express contract on the part of the infant, the reasoning is scarcely applicable, and it may be that the liquidator cannot succeed unless he can shew an act of ratification.

I cannot look upon the taking of the credit balance in the account as being undoubtedly an act of ratification. It seems to me that this is an act quite irrelevant to the issue. The money in the Merchants Bank was in no way ear-marked as the issue or produce of this stock.

Ordinarily the act relied upon as amounting to the adoption of a contract during non-age must be one done with some intelligent appreciation of its significance. Here, this young lady is supposed to have intended to render herself liable for calls upon this stock to the amount of \$525 by the withdrawing of this small deposit from the Merchants Bank. The line of cases referred to in *Simpson on Infants*, 3rd ed., pp. 41 and 42, does not appear to have been adequately considered, for there is a marked distinction between the position of an infant shareholder with a company at the time of his attaining majority, as a going concern, and where the company is being wound up.

This bank was in truth being wound up at the time the infant attained her majority, although the winding-up order was not

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made till subsequently. Proceedings had been taken at the time of the bank's failure looking to the nursing of its assets in the hands of a receiver appointed by the Banking Association. A winding-up petition was then presented, and enlarged from time to time; but, when the winding-up order was made, this petition was dropped, and a new petition was substituted. This, I think, cannot interfere with the substance of the matter. At any rate, in determining what is a reasonable time for repudiation, the fact that the bank was in liquidation ought to be borne in mind.

As I understand my duty upon an application of this nature, I should permit an appeal* where there is reasonable ground to suppose that the would-be appellant may obtain relief by further appeal, and a prolongation of the litigation cannot be regarded as vexatious. This case is apparently one of great hardship, and the appeal appears to me to be one clearly arguable. Leave will therefore be granted.

Muriel I. Clark appealed accordingly, and the liquidator also appealed (by leave) from the order of RIDDELL, J., in regard to A. D. Clark.

January 14, 1916. The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, AND HODGINS, JJ.A.

George Kerr, for the appellant Muriel I. Clark, argued that her acts did not constitute an acceptance of the stock—there must be some conscious act on her part. Mere taking of dividends did not amount to an adoption of the original contract. There was no discussion between father and daughter, and the transfer of dividends was made long before she came of age. She would not be satisfied that the father should remain liable. The bank authorities well knew that she was an infant. He referred to *Re Central Bank and Hogg* (1890), 19 O.R. 7, not cited by RIDDELL, J., and submitted that the cases referred to by the learned Judge had no application here. Reference was made to *In re Alexandra Park Co.*, *Hart's Case* (1868), L.R. 6 Eq. 512; *Simpson on Infants*, 3rd ed., pp. 41, 42; *In re Continental Bank Corporation*, *Castello's Case* (1869), L.R. 9 Eq. 504.

*See sec. 101 of the Winding-up Act.

Joseph Montgomery, for A. D. Clark, argued that the cases were clear that the person in whose name shares are placed is the one liable. We are not on the horns of a dilemma, as it is quite conceivable that in some cases there may be no person on whom liability can be fastened. He referred to *In re London Bombay and Mediterranean Bank* (1881), 18 Ch. D. 581; *In re China Steamship and Labuan Coal Co., Capper's Case* (1868), L.R. 3 Ch. 458.

J. W. Bain, K.C., and *M. L. Gordon*, for the liquidator, referred to Halsbury's Laws of England, vol. 17, p. 60; *Nickalls v. Furneaux*, [1869] W.N. 118. Some one must be a shareholder in respect of the shares.

Kerr, in reply, argued that there was no delay in repudiating liability, and relied on *Hart's Case*, *supra*.

January 24. GARROW, J.A.:—Appeal by Muriel Inman Clark from the order of Riddell, J., affirming the order of an Official Referee placing her upon the list of contributories, and by the liquidator from the order of the same learned Judge affirming the order of the Official Referee refusing to place A. D. Clark, the father of Muriel Inman Clark, upon the list—the appeals, which were closely related, having been argued together.

Muriel Inman Clark was born on the 6th December, 1890, and while she was still an infant, namely, in the years 1903, 1904, 1905, and 1906, her father, Mr. A. D. Clark, purchased certain shares in the capital stock of the Sovereign Bank, in all seven, in the name of his daughter. Of these, three shares were purchased from Mr. D. M. Stewart, the general manager of the bank, who apparently held them in trust; one from a Mr. Eby; and three, which had not been previously issued, from the bank.

The capital stock of the bank was afterwards by by-law reduced, and upon that reduction the shares now in question were reduced to five and a quarter shares. The shares were all fully paid-up.

On the 22nd day of December, 1913, the bank having become insolvent, winding-up proceedings were commenced and the liquidator was appointed. The claim now being made by him is in respect of the double liability under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29.

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The bank had really been in financial difficulties for some years previous to 1913. Down to the year 1907, dividends had been paid upon the shares in question, but none after that year. Payments were made by cheques (some fourteen in all) in favour of Miss Clark, all of which except one—dated the 16th August, 1907—were placed to her credit in the books of the bank. The history of the exception is not very clear. Miss Clark does not deny that the blank endorsement upon it (there is no other) was made by her. It bears upon its face the usual stamp by the bank's teller, as of a cheque paid across the counter. Miss Clark says she does not remember the circumstances, which is somewhat singular, for she was then a young lady of seventeen, and, so far as appears, was not in the habit of handling many cheques. Altogether it is, I think, a very reasonable presumption that she personally received the money for the cheque from the bank.

When the bank was struggling to overcome its financial difficulties, a number of its accounts were transferred to the Merchants Bank, which, with other banks, was endeavouring to assist the Sovereign Bank; and among the accounts so transferred was the account of Miss Clark. The transfer took place on the 18th January, 1908, and the amount, largely, although not quite entirely, made up of dividends upon the shares in question, was \$149.28. Upon this account Miss Clark on the 4th October, 1913, drew her cheque for \$110, which was paid to her. The balance still apparently remains in the Merchants Bank.

Riddell, J., held that, under the circumstances, Miss Clark was a shareholder in respect of the five and one quarter shares, and therefore subject to the claim for double liability upon them, and dismissed both appeals; and with his conclusions I agree.

An infant may by contract become the holder of shares in a bank. The legal effect of such a contract is the same as that of other voidable contracts of an infant, namely, that it is valid until repudiated. See *Edwards v. Carter*, [1893] A.C. 360; *Viditz v. O'Hagan*, [1900] 2 Ch. 87, at pp. 97, 98. And the repudiation must, to be effective, take place within a reasonable time after full age is reached: *Holmes v. Blogg* (1817), 8 Taunt. 35.

In *In re Constantinople and Alexandria Hotel Co., Ebbetts' Case* (1870), L.R. 5 Ch. 302, an infant had applied for and been allotted shares. The head-note states that he attained his majority on

the 8th April, 1864, and the company went on till June, 1865, when an order for winding-up was made. During this period, though he did not appear to have acted as a shareholder, he never took any steps to repudiate the shares, and it was held that he was bound by his acquiescence and must be placed on the list of contributories. When the case came first before the Master of the Rolls, it appeared that the infant had, after attaining his majority, executed a transfer of the shares, which appeared to form an important element in his judgment, as indicating a clear admission of ownership by the infant. But on appeal Sir G. M. Giffard, L.J., expressly put his judgment on the single ground of acquiescence, saying: "I do not rely on the transfer which he executed, but on the ground that he acquiesced for a lengthened period in being on the register." See also to the same effect, where a much shorter interval, namely, five months, was held to be fatal, *In re Blakely Ordnance Co., Lumsden's Case* (1868), L.R. 4 Ch. 31.

Miss Clark knew that her father had purchased some shares in her name. So much she admits in her rather reticent evidence. And the cheque of the 10th August, 1907, which she endorsed and presumably read, told her practically the situation as it is to-day. The cheque reads as follows: "Quarterly dividend No. 17. The Sovereign Bank of Canada, Toronto, 10th August, 1907. No. 208. \$7.87. Pay to the order of Miss Muriel I Clark, seven 87/100 dollars, being quarterly dividend at the rate of six per cent. per annum upon five and one quarter shares in the capital stock of this bank standing in her name."

Having such knowledge, there is not only no evidence of repudiation or disaffirmance by her at any time prior to this application, but there is, on the contrary, a distinct affirmation by her of her apparent position of shareholder, by the withdrawal of the money in the Merchants Bank nearly two years after she had attained her majority—money which she must have known represented the accumulated dividends upon the shares in question.

The appeal of Miss Clark, in my opinion, utterly fails, and should be dismissed with costs. The appeal of the liquidator should also be dismissed, but without costs.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

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MACLAREN, J.A.:—I am of opinion that the judgment appealed from is wrong in so far as it is based upon ratification by the withdrawal by Miss Clark after attaining her majority of a portion of the money to her credit in the Merchants Bank, which was made up partly by deposits by her father and partly by moneys transferred from the Sovereign Bank, the latter having been originally made up of dividends passed to her credit.

The relation of a bank and its customer is purely that of debtor and creditor, and moneys deposited are not ear-marked in any way: *Foley v. Hill* (1848), 2 H.L. C. 28. The case is the same as if she had the money in her pocket derived from different sources and she had used some of it for a particular purpose. It appears altogether too remote to construe the drawing of money from one bank as a ratification of what had taken place with another bank, years before, while she was an infant.

The case is not so clear when the liability is put upon the ground of laches and acquiescence. She would be liable if she did not repudiate within a reasonable time after coming of age. What would be a reasonable time would depend on all the circumstances of the particular case. Here there were several special circumstances that would tend to lengthen the time. It appears that Miss Clark considered that her money had been lost. The bank was in fact being wound up outside of the Act, and a petition had been filed in Court, but not proceeded with. Finally this petition was withdrawn, and a new one presented and acted upon.

However, I am of opinion that, considering the lapse of time between her coming of age and the time of the presentation of the petition for winding-up which was acted upon, and the fact that she had not repudiated the shares before the commencement of the actual winding-up, the appeal must be dismissed on the ground of laches and acquiescence. It is a hard case, and she is, in my opinion, legally liable only through the juggling of the petition for the winding-up, and her thereby becoming legally liable to the prosecution for the double liability.

HODGINS, J.A., agreed with MACLAREN, J.A.

Appeals dismissed.

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RE ONTARIO AND MINNESOTA POWER CO. LIMITED AND TOWN
OF FORT FRANCES.

Assessment and Taxes—Land of Power Company—Assessment Based upon Special Adaptability and Use for Particular Purpose—Enhanced Value—“Actual Value”—Assessment Act, R.S.O. 1914, ch. 195, sec. 40(1)—Compensation Value in Expropriation Cases—Motion for Leave to Appeal from Order of Ontario Railway and Municipal Board Confirming Assessment—Amount of Assessment—Question of Fact.

Under the present Assessment Act, R.S.O. 1914, ch. 195, sec. 40(1)—“Subject to the provisions of this section, land shall be assessed at its actual value”—in assessing land it is proper to take into consideration its special adaptability to such a use as the land in question in this case was being put to, viz., its use in developing a valuable water power which without it could not have been developed.

The principle of “rating” cases such as *Great Central R.W. Co. v. Banbury Union*, [1909] A.C. 78, and *East London Railway Joint Committee v. Greenwich Union Assessment Committee*, [1913] 1 K.B. 612, applied.

The principle of the “scrap-iron” cases, *In re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351, and later cases of the same group, if still binding (since the change in the statute—see R.S.O. 1897, ch. 224, sec. 28(1)), should not be extended to subjects of assessment with which they did not deal.

The rule settled in expropriation cases such as *Cedar Rapids and Manufacturing Power Co. v. Lacoste*, [1914] A.C. 569, and *Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083, that, in determining the compensation to be paid to the owner, the value of the land must be taken to consist in all advantages which it possesses, present or future, in so far as the possession of them enhances the value of the land, is applicable in ascertaining the “actual value” of the land for the purpose of assessment, subject to the qualification that it may be that in expropriation proceedings the fact that the land is taken without the consent of the owner may be considered; HODGINS, J.A., not agreeing in the opinion of the majority of the Court on this point.

In this case the assessor and the Ontario Railway and Municipal Board rightly took into consideration the enhanced value which “Water Power Block 2,” a part of the applicant-company’s lands, had by reason of its adaptability for the use to which it had been put and by reason of its having been put to that use; and an application for leave to appeal from the decision of the Board confirming the assessment was refused.

The question of the amount by which the value of the land had been enhanced was a question of fact and not of law, and as to that no appeal lay.

Re Bruce Mines Limited and Town of Bruce Mines (1910), 20 O.L.R. 315, and *Re Coniagas Mines Limited and Town of Cobalt* (1910), 20 O.L.R. 322, followed.

APPLICATION by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the 25th November, 1915, confirming the assessment of the real property of the company in the town. The leave was asked only as to the assessment of that part of the company’s land designated as “Water Power Block 2,” which was assessed at \$400,000.

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January 12. The application was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the company. An appeal lies only with the leave of the appellate Court and only in respect of matters of law. The property assessed consists of land under water on the Canadian side of the Rainy river at Fort Frances, at the point where the dam is built across the river. So far as it lies on the Ontario side, the dam is on the applicant-company's property, but the portion of the dam on the American side of the river is on the property of another company. The shares of the two companies which own the lands on each side are held by the same persons, and in this way the dam is in fact operated as a whole. The Ontario Railway and Municipal Board has confirmed an assessment of the applicant-company for a proportionate part of what they thought the dam was worth as a whole. The company seeks leave to appeal on the ground that the Ontario portion of the dam, without the other portion, which belongs to another company, is not worth half as much as the whole dam, just as in the "scrap-iron" cases the portion of the plant of electric light companies and other companies, in each separate ward of a city, were not by themselves assessable except upon a "scrap" basis. In the case of an international bridge, the Canadian portion was formerly assessable only on the "scrap" basis. The cases of light companies and bridge companies are now dealt with by special legislation. There being no legislation affecting the position of the applicant-company, the principle of the "scrap-iron" and bridge cases applies, and the company should be assessed only for the land upon the basis of its value as such, apart from the water power value attributable to the dam.

G. H. Watson, K.C., for the town corporation, respondent, argued that the question at issue was not one of law, but solely of fact. The value of land has always been assessed on this basis since 1910. [GARROW, J.A., referred to *Re Bruce Mines Limited and Town of Bruce Mines* (1910), 20 O.L.R. 315]. There is another case in the same volume, *Re Coniagas Mines Limited and Town of Cobalt* (1910), 20 O.L.R. 322. In these cases the issue was treated as one of fact. The "scrap-iron" cases have no application to the case at bar. He referred to *Re Ontario and Minnesota Power Co. and Town of Fort Frances* (1915), 8 O.W.N. 216; S.C., on

motion for approval of security on appeal to the Privy Council (1915), 34 O.L.R. 365; *Town of Fort Frances v. Ontario and Minnesota Power Co.* (1915), 9 O.W.N. 4.

Osler, in reply.

January 24. MEREDITH, C.J.O.:—This is an application by the Ontario and Minnesota Power Company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the 25th November, 1915, respecting the assessment of the real property of the company in the town of Fort Frances, and the leave is asked only as to the assessment of that part of the land designated as "Water Power Block 2," which was assessed at \$400,000, and the assessment of it was confirmed by the Board.

Water Power Block 2, with other lands, was acquired by Edward Wellington Backus and those associated with him, called the purchasers, from the Crown, under the terms of an agreement between His late Majesty King Edward VII. and them, which bears date the 9th day of January, 1905.

The agreement recites that the Rainy river in the neighbourhood of Fort Frances "forms a valuable and extensive water power" and that application had been made by the purchasers for "a grant in fee of such lands adjacent to the said river and of such lands covered by said river and of such privileges as are necessary to enable the purchasers to develop the said water power and to render the same available for municipal, manufacturing, and milling purposes."

The agreement also recites that this water power can be more advantageously developed and more power be produced by works embracing the entire width of the river and dealing with it as a whole, than by an independent development on the Canadian side of the international boundary, and that it was therefore in the public interest to adopt that plan of development; that the purchasers were the owners in fee simple of the lands and water power on the Minnesota side of the international boundary, opposite Fort Frances, and were desirous of obtaining from the Government of Ontario a grant in fee of the lands and power on the Canadian side of the international boundary, "for the purpose of developing the water power to the full capacity of the stream from side to side at high water mark, and of utilising such storage facilities as

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may be available for maintaining the river at such high water mark, thereby rendering available a large amount of power on the Canadian side of the river for municipal purposes and for the operation of pulp or paper mills, flour and grist mills, and other manufacturing establishments."

By the agreement the Government agrees to sell and the purchasers agree to buy certain lands in and adjacent to Fort Frances, including Water Power Block 2, "together with all water powers and privileges and all rights, easements, and appurtenances thereto belonging or appertaining."

By the agreement the purchasers covenanted to erect "a dam, conduit, or such other works on or near the river at Fort Frances, in accordance with plans attached to" the agreement, "sufficient to develop power to the full capacity of said river (including any increased capacity of said river by reason of the construction of storage dams or works)," and provision is also made as to the character and mode of construction of the dam and works.

Provision is also made for the formation of a joint stock company to which the rights of the purchasers under the agreement were to be transferred; and there are other provisions to which, for the purpose of the motion, it is unnecessary to refer.

In pursuance of the agreement, the purchasers applied for and obtained letters patent under the Ontario Companies Act, incorporating them by the name of the Ontario and Minnesota Power Company Limited.

The letters patent bear date the 13th day of January, 1905, and the purposes and objects for which the company is incorporated are declared to be, among others, "the production of electricity and of electric, pneumatic, hydraulic, or other power for any purposes for which electricity or power can be used," the storing, using, supplying, furnishing, distributing, selling, leasing, and otherwise disposing of the same, and entering into, performing, and carrying out any agreement with any power company authorised to do or perform or exercise any of the powers conferred upon the company, "for the purchase by and sale to the company of the whole or part of the rights, powers, franchises, assets, property, business, and undertakings of such other company . . . ;" but the company was not empowered to carry on any manufacturing business.

By supplementary letters patent issued in 1911, the company obtained an extension of its powers, enabling it to carry on the business of manufacturers of any kind of manufactured products in the manufacture of which hydraulic or electrical power can be used, and other businesses, including those of general merchants, traders, and dealers in all kinds of merchandise.

As we were given to understand upon the argument, a similar company was incorporated in Minnesota, and to it all the lands and rights in that State of the purchasers were transferred.

The dam and works mentioned in the agreement with the Government of Ontario have been constructed, and the applicant has erected on part of the land acquired under it a power-house, a pulp and paper mill, and other buildings.

The dam and works have been constructed by the two companies under an arrangement the terms of which do not appear in evidence, and by means of the dam and works more than 30,000 horse power has been developed, 5,000 of which has been developed on the Canadian side of the river, most of which is used in connection with the applicant's mills, and some of it is transmitted to the Minnesota side for use in the mills which the Minnesota company has in operation there, and some is supplied to purchasers on the Canadian side.

The two companies are, no doubt, separate entities, but both of them are controlled by the same persons, who, if I may use that expression with regard to a company, practically own them.

In assessing the lot in question, the assessor took into consideration the increased value beyond that of mere town or agricultural land which it had by reason of its special adaptability to the use to which it is put, and its having been put to that use, and that was held by the Board to have been proper, and in confirming the assessment the Board has acted upon the same view.

It was argued by Mr. Osler that this view is erroneous, and that what are called the "scrap-iron" cases are applicable.

In the view I take, it is necessary to determine whether, in the light of such cases as *Great Central R.W. Co. v. Banbury Union*, [1909] A.C. 78, and *East London Railway Joint Committee v. Greenwich Union Assessment Committee*, [1913] 1 K.B. 612, and in view of the change that was made in the Assessment Act in 1904, the "scrap-iron" cases are now binding upon us.

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In the first of the cases to which I have just referred, it was decided that in assessing the ratable value of a section of a railway link line within a parish, connecting two great systems, the cost of the construction of the link line is not as a matter of fact and business experience a measure of the rent at which that section of the line may be reasonably expected to let, and in stating what method should be adopted the Lord Chancellor said (p. 85): "It follows that the rent must be fixed in accordance with the real value of the section to the company concerned, because that is the footing on which a tenant would base his offer of rent if he be not exposed to extortion. And the method usually adopted for arriving at that real value is to ascertain the net earnings of the section by allocating to it a mileage proportion of all rates and fares received for the whole journey in respect of all traffic passing over the section, after making from the receipts proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenants' capital, and the statutory deductions. That is for present purposes a sufficient description of the usual method. I do not pretend to define it. No doubt this method is not ordered by the statute. It is, to use Lord Watson's phrase, a 'formula.' Nevertheless, though Courts of law have never said that it must be adopted, it is in ordinary cases a sound way of fixing the true value. When adopted by quarter sessions, the proper judges of this question of fact, Courts of law have repeatedly allowed it. It does not treat all the miles on the line as of equal value. On the contrary. The measure of the value is the sum which is in fact earned by each mile, so that a much used mile will pay more, exactly according to its profit-earning use. Without saying that this formula is imperative, or usurping a right to decide on questions of fact, I do think it has been so long and so constantly applied that the tribunal which decides the fact would not depart from it without good reasons."

Again, after pointing out that it would not be proper, because the link line was indispensable for through traffic from the north of England to the south and west, to determine the ratable value of it on the basis that the railway companies occupying the other portion of the line would give a great rent in order to occupy it also, the Lord Chancellor said that it would be equally reasonable for the railway company to say: "Here is a mile of railway line; you are to isolate it from the rest of the system, for all you are

to rate is this single mile; no one would give a sixpence for an isolated mile of railway; therefore the ratable value is nil;" and that the true view seemed to lie between these extremes, that "each section is regarded as a profit-earning part of the system to which it belongs; each section is indispensable to the working of the system," and the resulting inquiry is, "If the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant would give for the whole is applicable to the particular section which is to be assessed? That depends on profit-earning."

In the other case—the *East London* case—the question was as to the mode of assessing a link line joining up the systems of six railway companies, which was leased in perpetuity to a joint committee of these companies, at a rental of 56 per cent. of the gross profits of the line, with a minimum of £30,000 per annum. It was contended by the railway companies that what is termed the "parochial principle," which is practically the same as the "scrap-iron" principle, should be applied, but that contention was rejected by a Divisional Court and by the Court of Appeal, and it was held that the Court of Quarter Sessions in determining the ratable value of the link line had properly taken into consideration: (1) the geographical position of the line and the advantages afforded by it; (2) the connections and accommodation of the line; (3) the fact that the line was rented, occupied, and used in common by a number of railway companies; (4) what rent, in view of the position, connections and accommodation of the line, a tenant might reasonably be expected to pay for the use of it, taking one year with another. Farwell, L.J., in stating his reasons for judgment, said (p. 624): "It is obviously impossible to disregard the position, *i.e.*, the local situation, of the line: a mile of line in the abstract or at large is impossible of consideration for any practical purpose: its connections are of the essence, for its use depends on the access to it just as the value of a retail shop depends to a great extent on its accessibility; and its accommodation is the element of value arising from the fact that it is of value as an accommodation to the lessee lines: all these are elements of value which the hypothetical tenant may fairly be assumed to take into consideration."

It is true that in these cases what was to be determined was

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not the "actual value" of the subject of the assessment, but its "rental value." The principle of the decision, however, is, in my opinion, just as applicable in the one case as in the other. I refer also to what was said by Anglin, J., in *Irwin v. Campbell* (1915), 51 S.C.R. 358, 372.

The change in the assessment law to which I have referred was the substitution for the provision that, "Except in the case of mineral lands hereinafter provided for, real and personal property shall be estimated at their actual cash value, as they would be appraised in payment of a just debt from a solvent debtor" (R.S.O. 1897, ch. 224, sec. 28 (1)), of what is now found in R.S.O. 1914, ch. 195, sec. 40 (1)—"Subject to the provisions of this section, land shall be assessed at its actual value."

It may be that the Commissioners by whom the Assessment Act of 1904 was drawn, in recommending this change, had in view the "scrap-iron" decisions, and that their purpose was to prevent them from being afterwards applied, for I find that in their report, giving the reasons for recommending the change, they say: "In assessing land the assessor would naturally have to regard its condition, situation, and other advantages, and the use to which it is or may be applied It is thought that the requirement that the land shall be assessed at its 'actual value' will include every consideration which under varying circumstances should be weighed."

With great respect for the eminent Judges by whom the "scrap-iron" cases were decided, I venture to think that they placed too narrow a construction on the provisions of the Assessment Act then in force, which they had to apply; and I am clearly of opinion that those cases, if still binding upon us, should not be extended to subjects of assessment with which they did not deal; and I may, I trust not improperly, point out the extraordinary results which would follow if they were held to apply to the assessment of buildings. The Assessment Act requires that each lot shall be assessed separately, and that the whole or a portion of a building on it in the separate occupation of any person shall be separately assessed: sec. 22 (1) (e). One can imagine what would be the effect of applying the "scrap-iron" principle in these cases, especially now that land and buildings are required to be separately assessed, in a city like Toronto, in which there are

hundreds and probably thousands of buildings which occupy the whole or parts of two or more lots and a vast number of buildings parts of which are separately occupied, to say nothing of the "sky scrapers," with their hundreds of tenants separately occupying rooms in them.

As I have said, we are not called upon to determine whether the "scrap-iron" decisions are now to be followed. The subject of the assessment in them was not land, in its ordinary sense, but the poles and wires of a telephone company, in *In re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351; the rails, poles, and wires of a street railway company, in *In re London Street R.W. Co. Assessment* (1900), 27 A.R. 83; a bridge crossing the Niagara river, in *In re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114; and rails, poles, wires, and other plant of electric light companies and a telephone company erected or placed upon highways, in *In re Toronto Electric Light Co. Assessment* (1902), 3 O.L.R. 620.

In none of these cases was the Court called upon to determine the question which is before us, viz., whether in assessing land it is proper to take into consideration its special adaptability to such a use as Water Power Block 2 is being put to—its use in developing a valuable water power which without it could not have been developed.

I have no doubt that it was proper, in determining the "actual value" of the block, to consider whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power which has been developed and to assess it accordingly.

If the block had been expropriated before being so utilised, in determining the compensation to be paid to the owner its value would have been taken to consist in all advantages which it possessed, present or future, in so far as the possession of them enhanced the then value of the block. That is settled by numerous cases, to two of which, and those the most recent, I may refer: *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, and *Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083, both decisions of the Judicial Committee of the Privy Council.

That the same principle must be applied in ascertaining the

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“actual value” of land for the purpose of assessment, subject to the qualification that it may be that in expropriation proceedings the fact that the land is taken without the consent of the owner may be considered, is not, I think, open to question. In both cases what is to be determined is the same—the actual value of the land.

If, in ascertaining the value of land which has not yet been used for the purpose for which it is specially adapted, its adaptability for that use must be considered, it is, I think, an *à fortiori* case that, where the land is used for that purpose, its enhanced value by reason of its being so used must be taken into account. That appears to be covered by the second of the two propositions stated by Lord Dunedin in the *Cedar Rapids* case, where he says that the value “consists in all advantages which the land possesses, present or future” (p. 576).

The fact that, before the land could be put to the use for which it was especially adapted, the consent of another person would be needed, is a factor to be considered, and in some cases it might be that it was so improbable that the consent could be obtained that nothing ought to be allowed on account of the special adaptability, but that is a question of fact for consideration in determining the value of the land.

In this case no such difficulty exists. Practically the same persons own the land on both sides of the river. The recitals of the agreement seem to indicate that a dam extending beyond the international boundary line was not essential to the development of the water power on the Canadian side. I refer to the recital that “the said water power can be more advantageously developed and more power produced by works embracing the entire width of the river and dealing with it as a whole than by an independent development on the Canadian side of the international boundary.”

This, it is to be remembered, is the language used in an agreement to which the owners of the land on the Minnesota side of the river were parties: for, as the agreement states, the purchasers were the owners of the land on both sides of the river, and the very object of acquiring the land on the Canadian side was that the purchasers should be enabled to build their dam from bank to bank, and that they covenanted with the Crown to do.

I have no hesitation in coming to the conclusion that the assessor and the Board rightly took into consideration the enhanced

value which Water Power Block 2 had by reason of its adaptability for the use to which it has been put and by reason of its having been put to that use.

If that be the proper conclusion, the application for leave to appeal must be refused. The question of the amount by which the value of the land has been so enhanced is a question of fact and not of law; and, even if the Board had in our opinion allowed too much, as to which it is unnecessary to express an opinion, it is its judgment, not ours, that must prevail, as no appeal lies except as to matters of law.

It is not necessary to refer to the numerous cases which support what I have said as to a question of quantum being a question of fact and not of law. It will be sufficient if reference is made to the two rating cases I have mentioned and to the cases of *Re Bruce Mines Limited and Town of Bruce Mines*, 20 O.L.R. 315, and *Re Coniagas Mines Limited and Town of Cobalt*, 20 O.L.R. 322.

The motion must be refused with costs. As we have come to the clear conclusion that there is no error in law in the way in which the Board has dealt with the appeal to it, it would serve no good purpose to prolong the litigation by giving leave to appeal, especially in a case in which it is important that there should be no unnecessary delay in finally revising the assessment roll.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice of Ontario, except in the opinion therein expressed that the same principles should be applied in ascertaining assessment value as in fixing compensation value.

The point was not argued; but, when it is presented for decision, the fact that the municipality appraises the land each year as it then is, and in that way gets the benefit, from time to time, of each realised possibility as it occurs, must be considered. The reason for the rule in compensation cases that "all advantages which the land possesses, present or future," must be paid for, is that the land is finally taken, and the owner loses both those present and future advantages, and the taker gets them.

In the case of assessment the situation is so different that I prefer to place my decision in refusing the application upon the

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ground that the actual value in this case may properly include the advantageous position of this lot in relation to the other works. Consequently, the propriety of the amount fixed is at best a question of fact.

Application refused.

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Jan. 28.

LINDSAY'S CASE.

Banks and Banking—Winding-up of Bank—Delegation of Powers of Court to Referee—Winding-up Act, R.S.C. 1906, ch. 144, sec. 110—Intra Vires—Exercise of Powers—Settlement by Referee of List of Contributories, Subject to Appeal—Validity of Winding-up Order—Binding Effect—Right of Appeal—Contributory—"Shareholder"—Double Liability—Bank Act, R.S.C. 1906, ch. 29, sec. 125—Irregularities in Regard to Organisation Meeting—Certificate of Treasury Board Improperly Obtained—Effect upon Position of Shareholder—Conduct—Estoppel—Bank Act, secs. 12, 13, 14, 15, 132, 157.

Section 110 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that "after a winding-up order is made the Court may . . . by order of reference, refer and delegate . . . to any officer of the Court any of the powers conferred upon the Court by this Act," is *intra vires* of the Parliament of Canada.

An order for the winding-up of the bank, containing the usual provisions, directing a reference to an officer of the Court to take all such proceedings as might be necessary for the winding-up, and delegating to him, for the purpose of winding-up the business of the bank, all such powers as were conferred upon the Court by the Winding-up Act, etc., authorised the officer to settle the list of contributories, subject to appeal; and the powers conferred by sec. 110 were properly exercised.

Re Clarke and Union Fire Insurance Co. (1887-89), 14 O.R. 618, 16 A.R. 161, and, in the Supreme Court of Canada, *Shoolbred v. Clarke, Re Union Fire Insurance Co.* (1890), 17 S.C.R. 265, followed.

A Judge of the Supreme Court of Ontario, sitting in appeal from the finding of the officer of the Court upon the reference as to the liability of an alleged contributory, has no power to review the winding-up order. That order may be appealed against under sec. 104 of the Act; and, not being appealed against, is, while it exists, authority for the Referee to proceed, and binding upon the Judge on the appeal.

Upon the appeal from the finding of the officer enforcing against the appellant the "double liability" under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, it was contended that the appellant, although in fact a holder of shares under a completed contract entered into in the terms of the bank's charter, and in conformity with sec. 12 of the Bank Act, and although the bank was duly incorporated, was not a "shareholder," nor liable to be listed as a contributory, by reason of irregularities in connection with the organisation meeting (sec. 13) and the manner in which the certificate of the Treasury Board (secs. 14 and 15) was obtained:—

Held, that the appellant could not escape liability upon the ground of irregularities in regard to the meeting, if any there were.

(2) Assuming that the certificate ought not to have been issued, yet the business of the bank had been carried on by the appellant and his associated

subscribers, and the certificate had never been attacked or set aside: it could not be said that the bank never became a legal entity for the transaction of business; and the appellant could not—having acted and benefited as a shareholder—have redress, after the winding-up order, to the prejudice of creditors whose losses he and his business associates had been instrumental in bringing about.

Sections 132 and 157 of the Bank Act have no application to the improper obtaining of a certificate enabling a corporation to issue notes and carry on a banking business.

Review of the authorities.

Finding of an Official Referee affirmed.

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LINDSAY'S
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APPEAL by James R. Lindsay from the order of J. A. McAndrew, Esquire, an Official Referee, in a reference for the winding-up of the bank, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, confirming the placing of the appellant's name on the list of contributories.

October 18, 1915. The appeal was heard by LENNOX, J., in the Weekly Court at Toronto.

William Laidlaw, K.C., and *Wallace Nesbitt*, K.C., for the appellant.

J. W. Bain, K.C., and *Christopher C. Robinson*, for the liquidator, respondent.

The Minister of Justice for Canada and the Attorney-General for Ontario were notified, but did not appear.

January 28, 1916. LENNOX, J.:—On the 25th January, 1911, an order of this Court was made for the winding-up of the bank "by the Court under the provisions of the said Winding-up Act and amendments thereto." By a subsequent order of the same date, after appointing a liquidator, it was "further ordered that it be referred to John A. McAndrew, Esquire, Official Referee, to take all such proceedings as may be necessary for the winding-up of the said the Farmers Bank of Canada."

The order further provided and declared that "this Court doth hereby delegate to the said John A. McAndrew, for the purpose of winding-up the business of the said bank, all such powers as are conferred upon the Court by the Winding-up Act, and as may be necessary for the winding-up of the said bank."

The powers conferred upon the Court under the Winding-up Act may be exercised by a single Judge thereof (sec. 109).

Both orders were subject to an appeal to the Appellate Division of our Supreme Court by "any person dissatisfied with the order or decision" (secs. 110, 101, and 102).

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There was no appeal taken.

Pursuant to the order of reference, the Official Referee proceeded to settle the list of contributories, and placed the appellant, James R. Lindsay, upon the settled list as a contributory of the bank in respect of five paid-up shares of the capital stock, and \$50 paid him in dividends which ought not to have been paid; and this has been reported to the Court.

The motion is by way of appeal from this report; but the argument, so far as it touches the order of reference, is, if I may say so, by way of appeal from the decision of the learned Judge who made the order.

Section 110 of the Winding-up Act provides that "after a winding-up order is made the Court may . . . by order of reference, refer and delegate . . . to any officer of the Court any of the powers conferred upon the Court by this Act."

Aside from the merits, the appellant argues: (a) that Parliament had no power to enact sec. 110; (b) and that, if sec. 110 is not *ultra vires*, the powers conferred by it were not properly exercised.

The first point is surely hardly debatable. It is pointed out in support of it that under the British North America Act Parliament appoints the Judges, pays their salaries, and they hold office during good behaviour; and it is assumed that, by reason of this, Parliament is compelled to leave all questions arising under its various statutes to the determination of these Judges, and this without assistance from the duly appointed officers of the Court. This opens a very broad field, and is clearly contrary to the hitherto unquestioned course pursued by Parliament since Confederation.

If called upon to decide the question, I feel no hesitation in holding that Parliament, having power to legislate as to insolvency and the winding-up of insolvent companies, has power to determine upon the machinery by which they shall be wound up, and can say that questions arising in connection with these companies or corporations shall either be wholly or partly ascertained, adjusted, or determined by the Court, or by an arbitration, commission, board, or any other designated tribunal, and this either with or without reserving a right of appeal to the Courts.

It would be idle to dwell upon this. Cases in which this has

been done and is being done, both by the Parliament of Canada and the Legislatures, are numerous, and it is enough to refer to the Dominion Railway Board, the Ontario Railway and Municipal Board, and, very recently in Ontario, the Workmen's Compensation Board; all of these bodies having jurisdiction over adjusting and determining questions formerly left to the determination of the Courts. It will hardly be seriously contended that in these and similar instances the legislation was not *intra vires*.

In support of the second objection, it is argued that, inasmuch as sec. 108 provides that "the proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the Court," there must be a practically rigid compliance with what is usually done in the trial or preparation of an action under the provisions of the Judicature Act, and I am referred to subsec. (1) of sec. 64 and to sec. 65 of the Judicature Act, R.S.O. 1914, ch. 56, and to secs. 2 and 48 of the Winding-up Act.

Section 48 says the list is to be settled by "the Court," and, by sec. 2 (e), "the Court," in Ontario, means the "High Court of Justice." What the Court can do, as I have already pointed out, may be done by a single Judge (sec. 109).

As to sec. 48, the Court always settles, and upon this motion is now proceeding to settle, and will settle, the list of contributories; or take or direct the necessary proceeding to that end, subject of course to the right of appeal. "The action of the Master, which is always subject to appeal and revision, is the action of the Court:" judgment of Patterson, J., in *Shoolbred v. Clarke, Re Union Fire Insurance Co.* (1890), 17 S.C.R. 265, at p. 280. I can quite see that the proceedings should follow as nearly as may be the ordinary procedure of the Courts, but I am unable to see that this condition has been departed from. The *Union Fire Insurance Company* case, just quoted from, without more, is sufficient to answer the second objection, if indeed it should be dealt with upon this motion.

In that case, the order of the present Chancellor (see *Re Clarke and Union Fire Insurance Co.* (1887), 14 O.R. 618), after appointing a liquidator and directing that the security to be given by him be approved of by the Master in Ordinary, referred

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it to the Master in Ordinary to settle the list of contributories, take the accounts, make inquiries and reports, and do all necessary acts and give all necessary sanctions for the winding-up of the company's business. It was held that, in assigning to the Provincial Courts functions under the Winding-up Act, Parliament intended that they should be performed with the aid of its officers and by its ordinary machinery.

Speaking of the order there in question, Gwynne, J., 17 S.C.R. at pp. 268, 269, said: "I entertain no doubt that the order of the learned Chancellor of Ontario, which is the subject of this appeal, was a good and valid order under these Acts as the same are amended and consolidated in ch. 129 of the Revised Statutes of Canada . . . The objections taken to the form of the learned Judge's order appear to me of a purely technical character, affecting only matters of procedure, matters which are not, in my opinion, proper subjects of appeal to this Court. To speak of a reference to a Master of a matter which, according to the ordinary procedure of the Court, comes within his ordinary duty as a delegation by a Judge to a Master to do what it was the duty of the Judge himself to do, involves, in my judgment, a misuse of the term, a misconception of the intention of Parliament, and a misconception of the terms of the Act in which that intention is expressed."

Patterson, J., at pp. 278, 279, referring to what are now secs. 108 and 110, and to the latter as enacted to cover the objection as to so-called "delegation," says: "The ordinary procedure of the Court and the ordinary functions of its officers under the regular constitution and organisation of the Court, were not intended to be interfered with." And again: "The term 'delegation' is, to my apprehension, inaccurately used in this position."

I have not overlooked the fact that whether it could be left to the Master to settle the security to be given by the liquidator was the principal question raised in the Supreme Court, but the point here raised was very fully argued in the Court of Appeal (*In re Clarke and Union Fire Insurance Co.* (1889), 16 A.R. 161), and was presumably abandoned as hopeless.

The objections, assuming that they properly arise out of the motion, cannot be sustained. The order was clearly within the powers conferred by the statute; and, if I may say so, with great

respect, was providently made. But, even if I entertained a different opinion, the result would be the same. I have no jurisdiction to set aside the order or judgment of a Judge of co-ordinate jurisdiction.

In Halsbury's Laws of England, vol. 5, p. 394, it is said: "An abortive company which has not, in fact, been formed cannot be wound up as an unregistered company."

If, however, the Court does, without jurisdiction, make an order to wind up a company, the order cannot be treated as a nullity: and, unless and until it is discharged on appeal, it is binding on the creditors and contributories of the company, but not upon strangers. See also the judgment of Sir W. M. James, V.-C., in *In re London Marine Insurance Association* (1869), L.R. 8 Eq. 176, at p. 193.

The appeal is, as I have pointed out, to the Appellate Division, and the time for taking it is limited by sec. 104. While the order exists, it is authority for the Referee to proceed, and is binding upon me: *In re Arthur Average Association* (1876), 3 Ch. D. 522, at p. 529. All I can do—if the Referee has erred—is to give the judgment he ought to have given.

But I think the report of the learned Referee is right.

On the 18th day of July, 1904, by 4 Edw. VII. ch. 77 (D.), James Gallagher and four other petitioners and provisional directors "together with such others as *become shareholders*" were constituted *a corporation* by the name of "The Farmers Bank of Canada."

The Act of incorporation is in the form set out in schedule B to the Bank Act, and immediately upon incorporation these directors, with subsequent shareholders, became subject to the provisions of the Bank Act.

By sec. 5 of the Act of incorporation it is provided: "This Act shall, subject to the provisions of section 16 of the Bank Act, remain in force until the 1st day of July in the year one thousand nine hundred and eleven;" and sec. 16 of the Bank Act says: "If the bank does not obtain a certificate from the Treasury Board within one year from the time of the passing of its Act of incorporation, all the rights, powers and privileges conferred on the bank by its Act of incorporation shall thereupon cease and determine, and be of no force or effect whatever." By 4 & 5 Edw. VII.

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ch. 92 and 6 Edw. VII. ch. 94, the time for obtaining a certificate is extended until the 18th January, 1907.

The result at this point is that, by virtue of the special and general Acts, we have a banking corporation invested with certain rights, powers, and privileges which, without more, it will continue to enjoy until the 18th day of January, 1907, and which, even without the exercise of any of its powers, will continue to exist as a corporation until January, 1911. In other words, subject to the right of the Crown to take proceedings to revoke its charter, the power of Parliament to repeal its legislation, and the contingency of being wound up, the rights, powers, and privileges of the bank, on the one hand, and its corporate continuance, on the other, for the periods respectively mentioned, are absolutely fixed.

The 12th section of the Bank Act, R.S.C. 1906, ch. 29, says: "For the purpose of organising the bank, the provisional directors may, after giving public notice thereof, cause stock books to be opened, in which shall be recorded the subscriptions *of such persons as desire to become shareholders in the bank;*" and, in pursuance of this, stock books were opened on the 6th day of September, 1904.

On the 9th June, 1906, the appellant subscribed for five shares of the capital stock of the bank, and then or thereafter paid therefor, in full, \$500. These shares were allotted to him on the 4th July, 1906; and all of this is regularly entered and appears in the said stock books. He had notice or knowledge of allotment, and received, and retains, his share certificate as the holder of five shares. See the appellant's evidence on the reference.

In his application he authorised the secretary to enter his name and sign the stock book for him. Down to this time no irregularity or illegality upon the part of the bank or its provisional directors is alleged; and upon the argument of the motion—and this is entirely in harmony with Lindsay's evidence—counsel for the appellant disclaimed reliance upon any contention that the subscriptions were unfairly obtained or that they were not *bond fide* subscriptions within the meaning of the Act. Subject to the preliminary objections as to sec. 110 being *ultra vires*, and the jurisdiction of the Referee, already dealt with, the sole contention is, that the appellant, although in fact a holder of shares under

a completed contract entered into in the terms of the bank's charter, and in strict conformity with sec. 12 of the Bank Act, is yet not "a shareholder," nor liable to be listed as a contributory, by reason of irregularities in connection with the organisation meeting of the 26th November, 1906, and the manner in which the certificate of the Treasury Board was obtained.

The meeting referred to was holden under the provisions of the 13th section of the Act, which states that so soon as a sum of not less than \$500,000 of the stock has been *bonâ fide* subscribed, and not less than \$250,000 "thereof" has been paid to the Minister of Finance, the meeting may be called. A sum of \$250,000 was in fact paid to the Minister on the 23rd October, 1906.

Four weeks' notice of the meeting is to be given. The first publication of notice of the meeting appeared on the 24th October. It was called for the 26th November. Allowing for four weeks' publication, the first publication could as well have been on the 28th October.

Taking the figures given by counsel for the liquidator and not objected to, on the 22nd October there was \$510,000 subscribed and \$495,000 of stock allotted. By the 29th October, \$560,900 had been subscribed for and allotted. The meeting being advertised according to the statute, and notice by post-card given to each subscriber, the appellant must be taken to have had notice, and, as against creditors, was bound by its action. He could easily have ascertained, if he did not know, all that is now alleged. He was a reader of the "Daily Globe," one of the newspapers containing the publication. The notice appeared in the "Globe" from day to day. He does not swear that he did not know of the meeting, that he did not attend it, or that he did not as a matter of fact know of the state of the accounts.

If the meeting of subscribers was duly called, what was done at it was the act of the corporation, of the appellant, and his associate subscribers. Allotment is not mentioned in the statute; and whether it is necessary or not depends upon the statute, or memorandum of association, if any, and the form of application: Burton, J.A., in *Re Standard Fire Insurance Co.* (1885), 12 A.R. 486, at p. 491; Lindley's Law of Companies, 5th ed., pp. 15, 760, 768; *Bird's Case* (1864), 4 De G. J. & S. 200; *Adams' Case* (1872), L.R. 13 Eq. 474; *Harvard's Case* (1871), L.R. 13 Eq. 30. I do not

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think that the appellant can escape liability upon the ground of irregularities in this connection, if any there were.

Now as to the manner of obtaining the certificate. The sum of \$250,000 was paid to the Minister before the 29th October; the appellant's contention does not turn upon this, but on the circumstance that all of it was not directly obtained in money from subscribers. Subscriptions amounting, it is said, to \$189,400, were paid in cash, \$25,915 by transfer of securities, and \$291,310 by subscribers' promissory notes payable to the provisional directors.

Upon the pledge of these securities and the promissory notes or some of them, or upon notes alone, \$100,000 was borrowed by W. R. Travers, who subsequently, on the 26th November, became managing director. The notes were endorsed by the payees, without recourse, and the bank did not purport to be, and was not, liable upon them. Out of the proceeds of this loan the difference between \$189,400 and \$250,000, or \$60,600, was made up. To be exact, the whole \$100,000 borrowed was paid to the Minister, as shewn by the cheques, and \$150,000 taken out of the cash subscriptions; but the substantial fact is that the cash subscriptions were at the time more than \$60,000 short. It is obvious that by the use of the word "thereof" in sec. 13 (as above) it was expected, and perhaps intended, that \$250,000 would be collected from subscribers before the certificate of the Treasury Board would be obtained or applied for under sec. 15.

By sec. 14 of the Bank Act: "The bank shall not issue notes or commence the business of banking until it has obtained from the Treasury Board a certificate permitting it to do so.

"2. No application for such certificate shall be made until directors have been elected *by the subscribers to the stock* in the manner hereinbefore provided.

"15. No certificate shall be given by the Treasury Board until it has been shewn to the satisfaction of the Board, by affidavit or otherwise, that all the requirements of this Act and of the special Act of incorporation of the bank, as to the payment required to be made to the Minister, the election of directors, deposit for security for note issue, or other preliminaries, have been complied with, and that the sum so paid is held by the Minister."

The facts to be shewn to the Treasury Board were stated in a statutory declaration made by Travers and a letter written to the Minister on the 30th November, 1906. The statements in the declaration and letter may possibly be verbally true, but it is beyond doubt that the Minister did not understand the actual conditions at the time he granted the certificate. Whether he would or would not have issued the certificate if he had known how the money was obtained, I do not know. It is possible that, if the conditions had been candidly stated to him, including the substantial character of the subscribers generally, and that the shortage was not very large and was made up independently of the bank, he might have considered that the Bank Act had been substantially complied with. This point can only be a matter of conjecture. It is perhaps reasonable to infer that, if he had known the character of Mr. Travers as subsequently disclosed in the light of subsequent transactions, he would not have finally decided without further investigation.

For these causes the appellant contends that he was not a shareholder when the order for winding-up was made, or liable as a contributory under sec. 125 of the Bank Act. There is more to be said, and it is not favourable to the appellant; but, without more, I am clearly of opinion that the appellant was, and, in the sense of sec. 125 of the Bank Act, is, "a shareholder," and is properly placed upon the list of contributories.

It is said that there is no definition of "a shareholder" in the Bank Act. Why should there be? Upon a concluded agreement to sell and purchase shares, as here, I am unable to grasp the distinction attempted to be made between a holder of shares and "a shareholder."

It is argued that the certificate was fraudulently and illegally obtained. I am not able to go quite so far as that. It was certainly not honestly obtained. The provisional directors consulted a reputable firm of solicitors, and were advised that promissory notes could be legally accepted from subscribers in lieu of cash, in settlement for subscriptions. Under the circumstances, it could hardly be said that the provisional directors were intentional wrongdoers. It was open to them to apply for a certificate whenever they thought they were in a position to satisfy the Board that they had complied with the statutory conditions entitling

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them to have it. They were compelled to furnish such evidence of compliance as the Board might dictate. The Board was invested with judicial and discretionary functions, and it was for the Board, and not for the applicants, to say what evidence and what class of evidence of compliance should be furnished, and whether the statute had been complied with or not. The evidence was not all one way. The Board did not act without notice.

On the 8th October, 1906, some weeks before the organisation, Mr. Leighton McCarthy, K.C., a member of the House of Commons, wrote the Minister: "I have been consulted on behalf of a number of subscribers to the shares of the Farmers Bank, and from the instructions I have received a number of the subscribers will dispute the *bonâ fide* character of the subscriptions. I will therefore ask you to be good enough to stay any action which might be taken until I have an opportunity of discussing this with you," etc.

There were intervening telegrams and correspondence; and on the 19th October Mr. McCarthy again wrote: "I have received information that the alleged subscribers for shares paid a large sum of money in cash, and have signed notes for other large sums of money, and that the persons professing to act in the name of the bank have transferred notes and received the proceeds, and a deposit either has been or will be made of the cash received and the proceeds of these notes, or a sufficient amount to make up \$250,000."

Mr. McCarthy subsequently wrote that the claims of his clients had been adjusted, but without qualifying the statement he had made as to methods generally being pursued by the agents of the bank. Information to the same effect was given to the Minister by Sir Edmund Osler and Mr. David Henderson, both members of the House.

On the other hand, the statutory declaration of W. R. Travers, subsequently filed with the Treasury Board, was submitted to the Department of Justice, and the Deputy Minister wrote the Minister: "In reply I beg to state that the statements in the statutory declaration of Mr. Walter R. Travers are sufficient, *if they are accepted*, to shew compliance with the statutory provisions, and that the evidence thus afforded is such as the Treasury Board may lawfully accept under the Act, and thereupon issue to the bank a certificate under section 14 of the Act."

But what had been represented to Mr. Fielding (the Minister of Finance) perhaps caused him to hesitate still. That he acted in the utmost good faith, and, as it appeared then, in the public interest, I have no doubt at all; but, as it turns out, I fear he acted injudiciously in accepting the verbally accurate but evasive and misleading letter of Mr. Travers as sufficient evidence to supplement his statutory declaration and turn the scale; and, as a consequence, to quote from the official record: "It having been shewn to the satisfaction of the Board that all the requirements of section 15 of the said Act have been complied with, the Board authorise the issue of the certificate applied for."

Accordingly a certificate was issued "permitting the Farmers Bank of Canada to issue notes and commence the business of banking," on the 30th November, 1906. It is only fair to remember that this was during a session of the House, when the calls upon the Minister's time are insistent and incessant, and the strain from overwork very great.

Well, supposing there was error, and that the certificate ought not to have been issued? The business has been carried on by the appellant and his associated subscribers, and the certificate has never been attacked or set aside. Can I say now that the action of the designated tribunal was null and void, and that the bank, although already incorporated, never became a legal entity *for the transaction of business*? What is happening in the Courts all the time, and what Court is invested with the quasi-statutory and plenary authority of the Treasury Board? All the evidence may not have been adduced, or it may have been misleading or perjured, or the Judge may have erred in fact or in law; but the parties must abide by the judgment or get rid of it. If the appellant's contention is well-founded, the logical result would be, not that he ceased to be a shareholder on the 30th November, 1906, but that no debts were subsequently incurred, and the so-called creditors are not entitled to rank even upon the visible assets of the bank.

It was not discussed by counsel, and it has not become necessary for me to consider, whether, a sum of \$500,000 and upwards having been subscribed, and promissory notes converted into money, without liability upon the part of the bank, it can, or cannot, be said that a sum of not less than \$250,000 "*thereof*" was

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paid to the Minister in literal compliance with the terms of the Act. If this question can be answered affirmatively—and I am very far from concluding that it may not be—there is not much to criticise in the statutory declaration filed.

The same cannot be said of the letter to the Minister. The solicitor's advice would in no way justify a reply which was deliberately intended to mislead as to a question of fact.

This question is not settled by *Cass v. Ottawa Agricultural Insurance Co.* (1875), 22 Gr. 512. In that case "the company received the notes as payment, and had reckoned them as cash in estimating the amount of capital stock paid-up," raised money on them by pledging the liability of the company, and was compelled to take up and still held several of them. Proudfoot, V.-C., is careful to refrain from committing himself to an opinion upon such conditions as we have here, and says, at p. 517: "Whether it be competent for the company to accept notes as cash or not, I take it to be quite clear that borrowing money on the credit of the company to pay the 10 per cent. is beyond the powers of the company; and that is not a compliance with the requirement of the statute that 10 per cent. be paid; and that under such circumstances the company had no right or authority to assume to commence business—that it is a fraud upon the Act."

In that case the company commenced business without having in hand the prescribed statutory capital; in this case it did not.

It is hardly relevant, but I cannot refrain from interjecting that it was not the acceptance of these notes, but the subsequent diversion of the bank's funds to speculative schemes, coupled with mismanagement and extravagance, which caused the failure of the bank.

The argument is pressed further, and it is predicated upon the proposition that where a statute contains specific provisions or conditions, coupled with penalties for their infraction, if these provisions or conditions are violated, all that is founded upon them is *ipso facto* null and void; and, applying this, I am referred to secs. 132 and 157 of the Bank Act as penal provisions violated in applying for the certificate. The argument was not directly challenged. I need not pause to consider whether, as the enunciation of a principle of law, this argument is well-founded to all intents; it can better be disposed of as a question of fact.

Section 157 imposes a fine or imprisonment, or both, for "offences against the Act;" and sec. 132 enacts that the person who does certain things "is guilty of an offence against this Act;" but sec. 132 does not touch the manner of obtaining a certificate to issue notes or carry on a banking business, but provides only that "every director or provisional director of any bank and every other person, who, *before the obtaining* of the certificate . . . issues or authorises the issue of any note of such bank, or transacts or authorises the transaction of any business in connection with such bank, except such as is by this Act authorised to be transacted before the obtaining of such certificate, is guilty of an offence against this Act"—something which is not alleged to have been done here; and it seems to me that the appellant, retreating to this fortification, is occupying a veritable house of cards.

It does not follow that the appellant, as "a shareholder," upon proceedings taken while the bank was a going concern, was without remedy, *against the bank or its directors*, if the certificate was improperly obtained or its business was being carried on illegally or contrary to the charter or the Bank Act. The cases referred to on the argument and many other shew this; but not to the prejudice of the accrued rights of creditors, and not after the winding-up order is made.

Until he repudiates and takes action the appellant is one of the incorporated wrongdoers, and the remedy is *inter se*. If he sleeps on, as the appellant did, and, with some knowledge, as he admits, of irregularities and of litigation initiated long before the certificate issued, retains his share certificates, knows of the opposition at Ottawa, and does nothing (see his evidence), attends a shareholders' meeting as late as February, 1908, and concurs in its action, as a shareholder draws dividends which were never earned, and pointedly refuses, through his counsel, to refund them, he is perhaps too late to obtain any remedy after the order for winding-up, and certainly to have redress to the prejudice of creditors whose losses he and his business associates have been instrumental in bringing about. See cases collected in Halsbury's Laws of England, vol. 5, p. 131, para. 211; also *Oakes v. Turquand* (1867), L.R. 2 H.L. 325, followed in *Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor* (1915), 34 O.L.R. 161. Conditions

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change after a winding-up order: *Re Faulkner Limited, City of Ottawa's Claim* (1915), 34 O.L.R. 536.

To exonerate the shareholder would be in effect to annul the contract between the bank and its creditors. A transaction with a company, impeachable on the ground of being *ultra vires*, can only be set aside (or ignored) when both parties can be restored to their original positions: *In re Irish Provident Assurance Co.*, [1913] 1 I.R. 352.

The decision in *Re Standard Fire Insurance Co.*, 12 A.R. 486, was, that as to Kelly, Barber, and Copp there was no completed contract; they never became shareholders, and could not be made contributories; but there was a completed contract with Caston, and it was held that he was properly upon the list of contributories.

This does not help the appellant.

Page v. Austin (1884), 10 S.C.R. 132, 170, *Cass v. Ottawa Agricultural Insurance Co.*, 22 Gr. 512, *Dominion Salvage and Wrecking Co. v. Attorney-General of Canada* (1892), 21 S.C.R. 72, and *In re Ontario Express and Transportation Co.* (1894-5), 21 A.R. 646, 24 S.C.R. 716, are wholly irrelevant to the issues here, and are cases in which intervening rights of creditors do not arise.

In *Page v. Austin*, the action of the company in purporting to issue new stock before the original stock was paid for in full, was as clearly *ultra vires* as it would be for an ordinary partnership firm to issue so-called stock in the firm name. What was called "new stock" never had a legal existence. The *Ontario Express Company* case is the same. In *Sinclair v. Brougham*, [1914] A.C. 398, the Birkbeck Company assumed to establish a collateral deposit and banking business. It was not covered by or incidental to the business it was authorised to engage in. Moneys were taken in on deposit, and losses resulted. It was held that the shareholders in the authorised company were not liable.

The *Cass* case indicates what I said above, that the Courts will, at the suit of a shareholder, restrain a company, before or after it has obtained a certificate, from carrying on its business in violation of its charter or Acts of Parliament affecting it, and it does nothing more, unless it be to establish that a company's violation of its chartered rights or powers, and misrepresentation

in obtaining its certificate, does not change the status of its shareholders; they are shareholders just the same; and it was because Mr. Cass, notwithstanding what had been done, was still a shareholder, that the Court held that he could individually maintain the action.

The *Dominion Salvage and Wrecking Company* case is again an action in restraint, to prevent the company from acting *ultra vires*, and taken while matters were *in fieri*; and establishes, as well, that the Crown alone can proceed to annul the incorporation or certificate; and on the other hand that it was open to the Crown, as in this case, to take proceedings if it appeared that the certificate was improvidently issued, or for any other sufficient cause. See also *Bank of Hindustan v. Alison* (1871), L.R. 6 C.P. 222; *Peel's Case* (1867), L.R. 2 Ch. 674; *In re Nassau Phosphate Co.* (1876), 2 Ch. D. 610.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

STONEHOUSE V. WALTON.

Deed—Release of Interest in Land—Voluntary Deed—Action to Set aside—Lack of Independent Advice—Undue Influence—Laches.

The finding of SUTHERLAND, J., *ante* 17, against the validity of the deed executed by the plaintiff, was affirmed; his further finding that the plaintiff had, by a delay of twelve years, disentitled herself to relief, was reversed; and judgment was directed to be entered in favour of the plaintiff setting aside the deed in question, with costs.

APPEAL by the plaintiff from the judgment of SUTHERLAND, J., *ante* 17.

January 17. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. Laidlaw, K. C., for the appellant, argued that the learned trial Judge, upon the finding of fraud, should have set aside the fraudulent memorandum of agreement procured by the defendant from the plaintiff. The finding of fraud was warranted by the evidence: *Hoghton v. Hoghton* (1852), 15 Beav. 278. The lapse of time had not disentitled the plaintiff to a judgment setting aside the memorandum of agreement. The doctrine of laches was not

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applicable in this case. There had been no alteration of the position of the plaintiff and defendant in respect of the lands in question, nor had the defendant been in any way prejudiced by the delay: *McDonald v. McDonald* (1890-92), 17 A. R. 192, 21 S. C. R. 201; Halsbury's Laws of England, vol. 13, p. 168; *Salter v. Bradshaw* (1858), 26 Beav. 161; 6 Cyc. 303; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, at p. 1279.

J. E. Jones, for the defendant, respondent, urged that the evidence shewed that the transaction was a valid one, and so the learned trial Judge's finding of fraud was erroneous. He contended, also, that the judgment should be supported on the ground of laches, and cited, in support of that contention, *Allcard v. Skinner* (1887), 36 Ch. D. 145, and *Turner v. Collins* (1871), L. R. 7 Ch. 329.

Laidlaw, in reply.

February 4. MEREDITH, C.J.C.P.:—This action was commenced by the plaintiff in April, 1914, for the purpose of having a deed executed by her, which purports to release a part of her right to the land in question in the action, under the last will of Elizabeth Walton, deceased, set aside, on the ground of fraud.

The action was tried by Sutherland, J., without the intervention of a jury, and was dismissed, without costs. At the close of the trial, the learned Judge took time to consider the case, and eventually expressed his opinion in writing, setting out the facts very fully and coming to the conclusion that, if the action had been brought in due time, the plaintiff would have been entitled to the relief which she seeks, but that, by reason of the long delay, she had lost her right to any relief in this Court.

Upon this appeal the judgment is sought to be supported, upon the ground that the transaction was a valid one, and the Judge's finding in that respect erroneous, as well as upon the ground upon which he based his decision; therefore, it is necessary for us to consider both questions.

In order that the first of them may be dealt with intelligently, it is needful that the main facts of the case be first stated. There was really no very serious conflict of testimony at the trial, and there is little, if any, difficulty in understanding now, pretty ac-

curately, all the circumstances under which the execution of the deed by the plaintiff was obtained.

The plaintiff was an adopted daughter of Thomas Forfar and Elizabeth Forfar, his wife. She was adopted by them when about three years of age, and continued to live with them, as if their daughter, and as their servant, until she married in the year 1908. She seems to have performed her duties, as daughter and servant, very satisfactorily, and to have been well-content with her place in the Forfar family.

Elizabeth Walton was the wife of George Walton, who is a brother of Mrs. Forfar, and the father of the defendant.

Forfar owned a farm, not far from Toronto, which was, and always had been, his home, and is the land in question in this action. Through some unfortunate transaction he was about to lose that farm when George Walton stepped in and purchased it, in order to save his sister, and her husband, from being turned out of possession. For some purpose, and in some way not disclosed in the evidence, the land was conveyed to Elizabeth Walton, and it was her property at the time of her death.

The right which the Forfars had to it, after Walton had acquired the farm, was as tenants at a nominal rent, but in fact they remained in possession of it precisely in the same manner as they had done when it was owned by them.

Elizabeth Walton died in June, 1902, having first made her last will and testament, under which she disposed of the lands in question in this action, in these words: "My Scarborough farm to be leased at five dollars a year to Thomas and Elizabeth Forfar, now occupying same, during their lives, respectively, and after their death their adopted daughter Edith is to have the same privilege of renting at five dollars per year during her lifetime, after which it is to go to my son William Ralph or his heirs;" and she appointed her son William Ralph, the defendant, and George Hogarth, and her husband, executors of the will, and the will was duly proved in this Province and probate of it granted to them.

On the 4th July, 1902, the deed in question was drawn up, and was executed by the plaintiff, her foster-mother being present and being the attesting witness of the daughter's signature. It was also executed by the defendant, and, some time afterwards apparently, by the other two executors. The purpose of this

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deed was to obtain a release from the plaintiff of the gift to her under the will of Elizabeth Walton to this extent, that upon her marriage and upon her leaving the property so that she should no longer have the direct personal use and enjoyment of it, she should lose all her rights in the land.

The execution of the deed appears to have been procured by Joseph Walton, and his son, the defendant, through the sister and aunt, Mrs. Forfar. There seems to have been some communication by letter between the elder Walton and his sister, and some request from the younger Walton that the plaintiff should come to his office.

The plaintiff asserts, and there is no reason to doubt that assertion, that she did not know the purpose of her being brought to the defendant's office until she got there and was asked to sign the document.

It was said that some mistake had been made in the will of Elizabeth Walton; that it was not her intention that the plaintiff should have any interest in the land if she married.

The plaintiff asserts, and there is no reason to doubt the truth of that assertion, that the defendant stated to her foster-mother, during the time they were in his office and before the document was signed, that the plaintiff could be compelled to sign it if she were not willing.

She also asserts, and there is no reason to doubt the truth of that assertion, that she really did not know the meaning and effect of the deed which she signed until she read a copy of it, which had been given to her by the defendant, on her way home, some time after she had executed the original.

Although the plaintiff was, at the time, about twenty-four years of age, she had had no business experience; her whole life, generally speaking, had been that of daughter and servant of the Forfars, living upon their farm with them and serving them faithfully, and she seems to have recognised that she was to a considerable extent beholden to them and to have been willing and anxious to do their bidding.

This, of course, is not the whole story; the defendant gives a reason for taking from the plaintiff so largely her rights to the land in question without giving her a farthing for them. The story is: that Mrs. Walton, some time before her death, stated

to her husband that she had made a mistake in her will; that she had not intended the plaintiff to have the land in question if she married; and that it was her intention to alter the will to that extent at some convenient time; but that she died suddenly before that was done.

It can hardly be that there was any mistake in the making of the will; the will was drawn by her husband, and is in his handwriting. The most that reasonably can be said is, that the testatrix did not think about the marriage of the plaintiff when the will was made; or that, afterwards, she changed her mind in regard to the will and thought that the plaintiff should not have an interest in the farm if she married. It is unquestionable that the will, as it stands after having been proved by the executors, is the last will and testament of Elizabeth Walton, deceased, and that, under it, the plaintiff takes an interest in the land in question unfettered to any extent in the manner provided for in the deed which was taken from her by the defendant. So that the most that can be said in the defendant's favour is: that Elizabeth Walton at some time intended to change her will to the extent of depriving the plaintiff of any interest in the land if she married; whether Elizabeth Walton would have ever altered that will, no matter how long she lived, no one can tell. She might have changed her mind again and again; she did not alter it in any manner before her death.

How extremely dangerous a thing it is to make a will, of one who is dead, out of the verbal statements made in the lifetime, every one knows. An example is not necessary; but, as this case affords one, it may not be entirely a waste of time to call attention to the fact that, when the only witness upon the subject, George Walton, first stated, during the trial, in examination in chief, that which his wife had said upon the subject, he stated it in these words.—

“She says, ‘I did not intend Edith to have that all her life after she got married’.”

In cross-examination, the cross-examiner, not content with that, seems to have nagged the witness into amplifying it to this extent: “She said she had been reading from the will, and she saw there was a mistake in the will, she never intended that, she thought I had made a mistake in taking down what she told me.

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I said I might have done so, but she says, 'I never intended Edith to have the farm if she got married and got a home; I wanted that for my son.' "

When the defendant, so much personally and directly interested in the matter, came to deal with it, in the deed in question, he too amplified it to this extent: "upon her leaving the property so that she shall no longer have the direct personal control, use, and enjoyment of it."

So that it is quite obvious that no rights should be given, or taken away, under such circumstances, except after the most full and careful consideration of all the evidence bearing upon the question—I mean of course in a moral sense, as a family arrangement, or in any other manner, apart from the legal rights of the parties.

The plaintiff had no time for consideration, she had no sort of advice, independent or otherwise; she was asked to sign and signed accordingly: a thing not at all improbable, or what one would not expect, under all the circumstances; the defendant being a man living in the city of Toronto, and carrying on business there, one of the executors of the will, and nephew of Mrs. Forfar.

Under these circumstances, it seems to me impossible to contend, with any hope of success, that such a transaction as this could stand if rightly attacked.

In the case most relied upon by the plaintiff, *Turner v. Collins*, L. R. 7 Ch. 329, it was said by the Lord Chancellor (p. 338): "I think that nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy, and, as was laid down by the Master of the Rolls in *Hoghton v. Hoghton*, 15 Beav. 278, 302, two things are required to be proved by a parent setting up a deed in such a case: First, that the deed was the real and actual deed of the child, and was intended by the child to have the operation which it has; and secondly, that that intention was fairly produced."

Thus the case would stand if the deed in question merely gave effect to the alleged intention of the testatrix to alter her will;

and, that being so, what must be said of the case, having regard to the extension of that alleged intention, contained in the deed, an extension regarding which no explanation has been given, and an extension not attempted to be justified or excused at the trial?

The character of that further exaction is peculiar, and peculiarly unfair; the plaintiff was not to marry; and, though this prevented her from having some one, and the proper one, a husband as well as a husbandman, to work the farm for her, was not to be permitted to let it, but was tied down to a personal use and enjoyment of it.

If it were necessary, to entitle the plaintiff to relief, that actual fraud should be found in the procuring of the deed, this exaction would afford sufficient proof of it. It was something taken, by the defendant, from the plaintiff, without any sort of moral justification, or excuse, and without any pretence of a legal right to it or to anything else the deed took from the plaintiff, and gave to the defendant: the defendant could not but have consciously wronged the plaintiff to that extent. And, before parting from this branch of the case, I should point out that the impeached agreement, literally read, provides for forfeiture only after coming into possession, though doubtless it was intended to apply at all times; and this action is brought to get free from it altogether.

Then is the plaintiff precluded from having relief in this Court by reason of her delay in bringing this action? Within a few hours after the deed was executed she knew its meaning and effect; and was, quite naturally, much dissatisfied with it; yet this action was not commenced until about twelve years afterwards.

The main reasons for the delay are, that her foster-mother said she would take up the matter with her brother and nephew in her behalf, and her position in life, and especially in the Forfar family, upon which she was so largely dependent, and which, in turn, was so largely dependent upon the Waltons, gave her no opportunity for entering into litigation with the men upon whose benevolence they were all living, and who were city men of means and business affairs: but her sheet-anchor seems to have been, faith in her foster-mother to right every wrong.

She was not at any time quite her own mistress, quite independent; from the servitude of her foster-parents she passed into that of her husband, no mere formal service on the part of a farm-

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er's wife; though a status now so largely relieved of its one-time legal disabilities.

There was never an abandonment of her dissatisfaction; there were rumblings of discontent throughout, culminating in this action; rumblings which Joseph Walton heard some time before action taken, and, having heard, went to the plaintiff about, evidently to prevent litigation. She made her complaint of the unfairness of taking everything from her after her long and faithful service of the Forfars. Joseph Walton agreed to some extent in her complaint; but, instead of restoring what had been taken from her, directed her attention to Forfar's son, who had property and was a bachelor; and spoke of his intention to speak to him in her behalf, but there is not a word, in all the testimony, indicating that he did. He made no complaint then of the staleness of her claim.

The plaintiff's right to the property under the will has not yet arisen—it may never arise; and no kind of substantial prejudice has been caused to the Waltons by the delay. The utmost that can be said against the plaintiff is that in the meantime Mrs. Forfar has died, and so any testimony she could have given is lost; and that all memories get more or less rusty in twelve long years. But there is no reason for thinking that Mrs. Forfar's testimony would have been unfavourable to the plaintiff; there is reason for thinking the contrary, in the fact of her concurrence in the plaintiff's dissatisfaction and her promise to speak to her brother in the plaintiff's behalf. And eliminate all the evidence, except the defendant's own testimony, and yet the plaintiff's right to relief would be proved.

Whilst stale claims are always, and rightly, in disfavour, and generally, rightly, looked upon with suspicion, when once they are clearly established, and when the delay has caused no substantial prejudice to any one, there is no reason why they should not be enforced.

So that, if the plaintiff had only an equitable right, that right would not be counterbalanced by anything that would make it inequitable to give effect to it now; the defendant will not be obliged to give up anything, but the mere piece of paper; he has enjoyed nothing under it, nor done anything on his faith in it; and the mere lapse of twelve years is not in itself enough; and if

Equity were to act upon this question in conformity to statutes of limitations, I know of none that would preclude the plaintiff.

The case relied upon by the trial Judge—*Allcard v. Skinner*, 36 Ch. D. 145—was one very different from this case. The money there sought to be recovered had been paid to the defendant by the plaintiffs for religious purposes and had been expended accordingly. The claim was substantially one for money “had and received,” to which the statutory bar of six years would apply, and the Court by analogy applied it. And in the case upon which, I have said, the defendant most relies, *Turner v. Collins*, the Lord Chancellor gave these reasons, among other reasons, for giving effect to the defence of laches (p. 341): “It is not reasonable for the Court to allow the child to hang, as it were, a sword over the parent’s head, and to keep him in suspense for an indefinite length of time;” and “that the father should not be allowed to go on, until he is upwards of seventy years of age, thinking that such is a certain provision for his wife, and then to find out that he has been mistaken, and that there is a very much smaller provision for his wife and his daughter.” But the Damoclesian danger in this case being not over the defendant, but over the plaintiff, and a two-edged sword at that: if she married, one edge cut off all her rights; if she lived and died an old maid, the other edge cut off her right to let the farm: it seems to me to be time for the removal of the sword, rather than giving effect to its worse edge because the defendant has so long held it over the woman’s head. It may also be said that in the case of *Turner v. Collins* the trial Judge had held the transaction there in question to have been not an unreasonable one: see *In re Sharpe*, [1892] 1 Ch. 154.

Besides all this, if there were, as if necessary I would find there was, actual fraud, the lapse of time would plainly be no hindrance to the plaintiff: see *Hatch v. Hatch* (1804), 9 Ves. 292, and *McDonald v. McDonald*, 21 S. C. R. 201.

At law the plaintiff’s action would be brought for possession—and could only be brought after the death of the first two life-tenants; the defence would be the release contained in the deed; and the replication, fraud—which avoids all things—in procuring it: and in such an action the plaintiff would recover, the fraud being proved.

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In my opinion, the trial Judge was right in his ruling upon the first branch of the case, and wrong upon the second; and so I would allow this appeal with costs; and set aside the direction of the trial Judge, for the entry of judgment dismissing the action, and would direct that judgment be entered, instead, setting aside the deed in question, with costs.

LENNOX, J.:—I agree in the result.

MASTEN, J.:—I agree.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Sutherland dismissing an action to set aside a conveyance, the ground of the dismissal being laches.

The facts are set out in sufficient detail in the judgment complained of, and I agree with the finding that the plaintiff had an equity to set aside the conveyance: I am unable to agree that she has disentitled herself to this relief by delay.

There is nothing here of change of position of the defendant, expenditure of money or time by him, or the like; nothing of unsettling family settlements; nothing of estoppel—there is mere delay and nothing more. In such a case it is said, “twenty years may be taken as the period which in practice will bar a claim on the ground of delay:” Halsbury’s Laws of England, vol. 13, p. 172, para. 207—but no number of years can be fixed.

Sir Pepper Arden, M.R., sitting for the Lord Chancellor in *Hercy v. Dinwoody* (1793), 2 Ves. Jr. 87, at p. 93, asks himself the question, “whether I am bound by any rule that has been laid down,” and answers emphatically: “certainly not. Every case must depend upon its particular circumstances.” There a delay of seven years, followed by another of thirty-three years, was held fatal. In *St. John v. Turner* (1700), 2 Vern. 418, Lord Keeper Wright thought a claim “within one year of its grand climacteric” should rest in peace.

The Irish Lord Chancellor Hart in *Byrne v. Frere* (1828), 2 Molloy 157, at p. 176, says that “length of time of more than twenty years” will bar such a claim: twelve years we find suggested in *Williams v. Thomas*, [1909] 1 Ch. 713, at p. 722, per Cozens-Hardy, M. R.: but more than forty did not prevent relief in *McDonald v. McDonald*, 17 A. R. 192, 21 S. C. R. 201. We should

not attempt to put the law more definitely than it is put in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, at p. 240: "In every case, if an argument against relief, which otherwise would be just, is founded on mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable;" and the claimant is barred (p. 239) "where it would be practically unjust to give a remedy."

On no principle of equity would there arise any injustice in compelling this defendant to abandon his unrighteous advantage.

I would allow the appeal with costs in this Court and below.

In so deciding we are giving the judgment the learned trial Judge would have given, had he not thought that the cases forbade that course.

Appeal allowed.

[APPELLATE DIVISION.]

DALES V. BYRNE.

Solicitor—Lien for Costs—Money Paid into Court by Garnishee—Creditors Relief Act, R.S.O. 1914, ch. 81, secs. 5 (1), 6 (2)—Costs of Attachment Proceedings—Priority—Costs of Action in which Judgment Recovered by Attaching Creditor—Rule 689—Right to Equitable Interference of Court—Lien on Client's Ratable Share of Fund to be Distributed by Sheriff.

By sec. 5 (1) of the Creditors Relief Act, R.S.O. 1914, ch. 81, a creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor; and, by sec. 6 (2), money recovered by garnishee proceedings is to be distributed ratably among creditors, in the manner pointed out in the section, "subject to the payment thereof to the creditor who obtained the attaching order of his costs of such proceedings:"—

Held, that the solicitors for the plaintiff, who had recovered judgment for him against the defendant, and had, by attachment proceedings founded upon the judgment, secured payment into Court of a sum of money owed by the garnishee to the judgment debtor, were entitled to payment thereout of their costs of the attachment proceedings, but not of their costs of the action in which the judgment was recovered; the balance, after payment of the costs of the attachment proceedings, was to be distributed by the sheriff in accordance with the statute.

The fund never having been in the possession or control of the solicitors, they had no lien upon it.

Bell v. Wright (1895), 24 S.C.R. 656, distinguished and commented on.

Mercer v. Graves (1872), L.R. 7 Q.B. 499, specially referred to.

And the solicitors had not established a right to the equitable interference of the Court under Rule 689.

Semble, that they would be entitled to a lien upon their client's ratable share of the fund.

APPEAL by the plaintiff's solicitors from an order made by DENTON, Jun. J. of the County Court of the County of York, in

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an action in that Court, upon an application by the appellants for payment out of Court to them of the amount of their costs of attachment proceedings and of the action; the appellants claiming a lien upon the fund in Court upon the ground that it was created or preserved by their exertions. The order made upon the application, and now the subject of appeal, while it allowed the appellants their costs of the attachment proceedings out of the fund in Court, the fruits of the attachment proceedings, directed that the balance should be paid to the Sheriff of Toronto for ratable distribution among creditors, under the Creditors Relief Act, R. S. O. 1914, ch. 81, secs. 4, 5, and 6.*

January 18. The appeal was heard by MEREDITH, C. J. C. P., RIDDELL, LENNOX, and MASTEN, JJ.

T. N. Phelan, for the appellants, the solicitors, argued that the Creditors Relief Act did not operate to defeat their lien for costs on the amount obtained under the judgment in favour of their client, obtained by their exertions; and cited *Bell v. Wright* (1895), 24 S. C. R. 656, and *Moxon v. Sheppard* (1890), 24 Q. B. D. 627.

No one appeared to oppose the appeal.

February 4. MEREDITH, C. J. C. P.:—The solicitors assume that they have a lien upon the moneys in question, and then ask the Courts to hold that the Creditors Relief Act does not deprive them of it: but we must first be assured that they have a lien; and it is quite obvious that they never had any such right, never having had possession of or any control over the moneys. Having recovered the judgment for their client, and attached the moneys,

* 4. Subject to the provisions hereinafter contained, there shall be no priority among creditors by execution.

5.—(1) A creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself.

6.—(1) Where a sheriff levies money under an execution against the property of a debtor, or receives money in respect of a debt . . . he shall forthwith make an entry . . .

(2) The money shall thereafter be distributed ratably among all execution creditors and other creditors whose executions or certificates given under this Act were in the sheriff's hands at the time of the levy or receipt of the money, or who deliver their executions or certificates to the sheriff within one month from the entry, subject to the provisions hereinafter contained as to the retention of dividends in the case of contested claims, and to the payment of the costs of the creditor under whose execution the amount was made; and subject also to the provisions of sub-sec. 6 of the next preceding section, and, as respects money recovered by garnishee proceedings, subject to the payment thereof to the creditor who obtained the attaching order of his costs of such proceedings.

they had a right to seek the equitable interference of the Court in aid of any equitable right they might have to payment of their costs out of these moneys: see *Hough v. Edwards* (1856), 1 H. & N. 171, and *Mercer v. Graves* (1872), L. R. 7 Q. B. 499: a right now expressly given in Rule 689.*

Under the Creditors Relief Act, moneys so attached, that is, attached in garnishee proceedings, as well as under other process of the Courts, shall be deemed to be so attached, etc., for the benefit of all creditors.

What equity then have the solicitors over these statutory rights of the other creditors of the common debtor?

Any right these solicitors can have cannot be greater than the right of their client. Anything that may have been preserved or recovered has been recovered for the client's benefit: there is no conflict of interests between solicitors and client: see *Francis v. Francis* (1854), 5 D. M. & G. 108; and *Re Harrald, Wilde v. Walford* (1884), 51 L. T. R. 441.

In view of the provisions of the Act providing for equality among creditors, why should the client have a lien upon the moneys for his costs of the action? The judgment is not exhausted unless satisfied out of the client's share of the moneys: it may be otherwise enforced. If it is said, without the judgment there could have been no attachment, might it not also be said, without the debt there could be no judgment, and so there should be an equitable right to priority for all over other creditors, the very thing the Act was passed to prevent? Other creditors may have or may yet recover judgment; and they might have, as well, attached the moneys. So it is difficult for me to see any great inequity in the enactment giving to the plaintiff priority over other creditors to the extent of the costs of the garnishee proceedings only. The solicitors will have their lien upon their client's ratable share of the moneys attached, and that may be enough, with payment of their costs of the garnishee proceedings, to satisfy all their just claims for costs.

* 689.—(1) Where a solicitor has been employed to prosecute or defend any cause or matter, the Court may, upon a summary application, declare such a solicitor . . . to be entitled to a charge upon the property recovered or preserved through the instrumentality of such solicitor, for his costs, charges and expenses of or in reference to such cause, matter or proceeding; . . .

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Much reliance was put, in the solicitors' behalf, upon the case of *Bell v. Wright*, 24 S. C. R. 656, though it is not in point, being a case of set-off of debts to the prejudice of a solicitor's claim: and it may be that that case, having been based so largely, if not altogether, on the view expressed by Cairns, L. J., in the case of *Ex p. Cleland* (1867), L. R. 2 Ch. 808—a case upon its peculiar facts a very strong one in favour of the solicitor—some of the expressions made use of in it must be modified, as those of Lord Justice Cairns must be, in view of the judgment in the case of *Mercer v. Graves*, L. R. 7 Q. B. 499, a case which does not seem to have been brought to the attention of the learned Chief Justice who pronounced the judgment of the Court in the case of *Bell v. Wright*.

The cases *Sympson v. Prothero* (1857), 26 L. J. Ch. 671, and *Eisdell v. Coningham* (1859), 28 L. J. Ex. 213, are not at all like this case. In them the client was the debtor of the attaching creditor, and his judgment debtor was the garnishee: so it was quite reasonable and fair for the solicitor to say: "Take the judgment debt, it is my client's, but leave the costs to me, for they are really mine, the reward of my labour and expense, which remains wholly unpaid; and let them be the first fruits, because, if not incurred, there might be no debt to attach, or, at the best for you, a debt which you would have to establish at a like cost."

In this case the judgment debtor is the common debtor and a third party the garnishee; so all that the solicitors reasonably and fairly can say is: "Give the costs of the garnishee proceedings to us, because we took them for the general benefit of the creditors—the Legislature having prevented the taking of them for any other purpose—and they are getting that benefit." It would be unreasonable and unfair to say, in view of the statute, pay us also for the work we did for our client, the full benefit of which he still has—his judgment; and doubly so to the extent that the solicitors can pay themselves out of the ratable share of the attached money coming to their client under the statute.

But, however all that may be, the statute in question, in unmistakable words, provides that the moneys in question shall go to the creditors who come within its provisions, ratably, less the costs of the garnishee proceedings, which the attaching creditor

—the client in this case—is to have. How then can client or solicitor have more than that?

The appeal must be dismissed.

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LENNOX, J.:—Robinette, Godfrey, & Phelan, as solicitors for the plaintiff, recovered a default judgment in the County Court against the defendant. The amount recovered for debt is not stated. The costs at this time could not have been very large, but I have no way of ascertaining them. While the matter was in this position, an attaching order was issued upon a debt accruing due by Zelinda Marshead to the defendant. The attachment was in February, 1915. The default judgment was in the previous July. After the attachment, the defendant applied to set aside the judgment, and Mr. Phelan says in his affidavit of the 30th September, 1915, that by consent the defendant was allowed in to defend, "upon the terms that the moneys attached should be paid into Court as soon as the contract was fulfilled." What was done, seeing that it was done by consent of the plaintiff's solicitors and the plaintiff, is important. The order taken out in the attachment proceedings contains this clause: "And it is further ordered that the costs of the judgment creditors upon this application shall be first paid from the said money, and that the balance be then paid to the Sheriff of the City of Toronto to be dealt with under the provisions of the Creditors Relief Act." The garnishee was not ordered to pay until the 26th April, 1915. This order has not been set aside or appealed against, and, I presume, has been complied with. If the appellants had any right of lien, that would be the time to assert it, I would think. The Creditors Relief Act is explicit as to how moneys are to be dealt with. It is "An Act to prevent Priority among Execution Creditors." By sec. 4, there is to be no priority among execution creditors except as mentioned in the statute. By sec. 5, sub-sec. (1), a creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself; sub-sec. (2) imperatively requires that the money attached shall be paid to the sheriff, and this even if there is no execution in the sheriff's hands: see sub-sec. (4). Money realised under the Absconding Debtors Act must also be brought in for general distribution, and all shall be entered in a book in a prescribed form

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and retained for a month, and distributed ratably subject to the specific exceptions. One of these is the costs of the creditor who has the first execution with the sheriff. The plaintiff has not been shewn to be an execution creditor. The other exception would apply to the plaintiff and possibly aid the appellants, that is, the costs of garnishee proceedings are also given priority, but this is provided for by the order referred to. The solicitors have got them.

I shall have to return again for a moment to the history of the case. The solicitors are not appealing from the order referred to. This was made on the 3rd February, 1915. They appeal from an order of the 25th November, 1915. Rule 689 empowers the Court to declare that solicitors are entitled to a charge upon "property recovered or preserved" through their instrumentality. It is a discretionary power, which the Court may or may not exercise: *Pierson v. Knutsford Estates Co.* (1884), 13 Q. B. D. 666; *In re Humphreys*, [1898] 1 Q. B. 520; *Harrison v. Harrison* (1888), 13 P. D. 180; *Nevills v. Ballard* (1898), 18 P. R. 134. A discretion will not authorise any Court to ignore the express provisions of a statute.

Mr. Phelan did not say that his application to His Honour Judge Denton was under this Rule; but, if it was well launched, it necessarily was so. He had no lien at common law, for that is a right of retainer, and can only arise where he has something to retain—where the money is in his own hands. The application was refused, and this appeal is from the order dismissing the motion.

The obstacles in the way of the solicitors are many and very formidable. The order of the 3rd February has not been set aside or modified, and, while it stands, controls the situation: *In re Arthur Average Association* (1876), 3 Ch. D. 522, at p. 529; *In re London Marine Insurance Association* (1869), L. R. 8 Eq. 176, at p. 193.

The learned County Court Judge has no right or power to make an order inconsistent with his former order while it is in force. His power to amend or discharge it need not be considered, for the double reason that he was not asked to do so, and, if he had been, he would be confronted by the Creditors Relief Act, and he certainly could not amend it in disregard of the rights of creditors without notice to the parties to be affected.

The power of the Court, as I said, is discretionary, and this, if I may say so, would not have been well exercised in the face of the express object and provisions of the statute. It is a discretion in this case, fettered by a very rigid limitation.

The objection, however, that goes to the root of the whole matter is that the statute is plain and clear in its purpose, provisions, and exceptions, and cannot be ignored. To disregard its terms and substitute others would be legislation of a very daring character. It may be said that it is a hardship that the party and party costs of the earlier and later litigation should be distributed, but it is what the statute says, and these costs are not the solicitor's until he gets the proceeds of the judgment into his hands. Even then, it is only a right to retain until a bill of costs has been delivered, and, if so demanded, taxed.

In *Union Bank v. Stewart* (1895), 3 Terr. L. R. 342, the solicitor was aided to the prejudice of an attaching creditor, but that was by reason of a provision in the Solicitors Act which we have not here. The money, until it is in the solicitor's hands, whether for debt or costs, is the client's money. There is no separation. In *Hutchinson v. McCurry* (1903), 5 O. L. R. 261, a solicitor was allowed to sue directly for costs awarded to his client in an action in which he had acted, in Quebec; but this was because in that Province sec. 553 of the Code provides that "every condemnation to costs involves by operation of law a distraction in favour of the attorney of the party to whom they are awarded." Our law is otherwise; and, even in Quebec, an advocate is "not a party to the action," but an agent only; and in *Beaudin v. City of Montreal* (1901), Q. R. 20 S. C. 32 (C. R.), it was held that the solicitor conducting a case in the Records Court of Montreal was not entitled to a distraction, as the Code did not apply to the Records Courts.

I think the appeal should be dismissed, and, being unopposed, should be dismissed without costs.

RIDDELL and MASTEN, JJ., agreed in the result.

Appeal dismissed without costs.

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[APPELLATE DIVISION.]

Feb. 4.

HUNT V. LONG.

Chattel Mortgage—Security for Existing Debt and Future Indebtedness—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, secs. 5, 6 — Invalidity as to Future Indebtedness—Validity as to other Part.

A chattel mortgage was given for the purpose of securing the payment of an existing debt, and also to secure future indebtedness. The mortgage was admittedly invalid as against creditors, in so far as it purported to be a security for a future indebtedness, by reason of non-compliance with the requirements of sec. 6 (1) of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135; but, as security for the payment of an existing debt, was unobjectionable, the requirements of sec. 5 having been observed:—

Held (RIDDELL, J., *dubitante*), that the mortgage was good as a security for the existing indebtedness.

Review of the authorities.

Hughes v. Little (1886), 17 Q.B.D. 204, 18 Q.B.D. 32, and *Campbell v. Patterson* (1893), 21 S.C.R. 645, specially referred to.

Judgment of the First Division Court in the County of Wentworth affirmed.

APPEAL by the plaintiff from the judgment of the First Division Court in the County of Wentworth upon an interpleader issue as to the validity of a chattel mortgage under which the defendant claimed property seized under the plaintiff's execution against the goods of the mortgagor. It was found in the Division Court that the mortgage was a valid security in so far as it secured the payment of an existing debt, though admittedly invalid (as against creditors) as a security for a future indebtedness.

The provisions of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1914, ch. 135, applicable, are secs. 5 and 6:—

"5. Every mortgage of goods and chattels in Ontario, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, . . . shall be registered . . . together with

"(a) the affidavit of an attesting witness. . . .

"(b) the affidavit of the mortgagee that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him.

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"6.—(1) A mortgage of goods and chattels made

"(a) to secure the mortgagee for advances made in pursuance of an agreement in writing to make future advances . . . or

"(b) to secure the mortgagee against the endorsement of any bill of exchange or promissory note . . .

"may be registered . . . if accompanied by

"(c) the affidavit of an attesting witness . . . and

"(d) the affidavit of the mortgagee stating that the mortgage truly sets forth the agreement and truly states the extent and amount of the advances intended to be made or liability intended to be created by the agreement and covered by the mortgage, and that the mortgage is entered into in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the liability intended to be created, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which they may have against the mortgagor."

January 19. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. H. Sedgewick, for the appellant, argued that the mortgage, because invalid as to future indebtedness, was void *in toto* as against the creditors of the mortgagor, and cited in support of his contention *Hughes v. Little* (1886), 17 Q. B. D. 204, 18 Q. B. D. 32; *Kitching v. Hicks* (1884), 6 O. R. 739; *Goulding v. Deeming* (1887), 15 O. R. 201; *A. E. Thomas Limited v. Standard Bank of Canada* (1910), 1 O. W. N. 379.

H. S. White, for the defendant, respondent, contended that the mortgage might be bad in part, and good in part, and referred to *Campbell v. Patterson* (1893), 21 S. C. R. 645. He suggested that the learned trial Judge erred in basing his judgment upon *Hughes v. Little*, 17 Q. B. D. 204, in the Divisional Court; that judgment, on the present question, was reversed by the Court of Appeal, 18 Q. B. D. 32.

Sedgewick, in reply.

February 4. MEREDITH, C.J.C.P.: — The one question involved in this appeal is, whether a chattel mortgage given for two quite separate and independent purposes, and so really two

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mortgages in the one instrument, is altogether invalidated by the Bills of Sale and Chattel Mortgage Act, because, although it complies in all respects with the provisions of that enactment as to the one purpose, it does not comply with it as to the other, and is on all hands admitted to be bad as to that.

The two purposes of the mortgage were: (1) to secure the payment of an existing debt; and (2) to secure future indebtedness.

The enactment makes quite separate and different provisions as to the affidavit of *bona fides* which shall be registered with the mortgage in the case of an existing debt, and in the case of such future indebtedness; so that one may think that what was in the mind of the draftsman of the Act was separate mortgages, and that in separate mortgages would be the more convenient way of taking the security and complying with the requirements of the Act; but there can be no legal objection to the taking of the two securities in the one instrument. If two mortgages had been taken and registered in this case, it need hardly be said that the invalidity of one, for want of compliance with the provisions of the Act, could not invalidate the other, or have any effect upon its validity or invalidity in respect of registration. Why, then, should that entirely separable, indeed in no way connected, part of the mortgage in question, securing payment of the existing indebtedness, be invalidated because the other part of it, securing future indebtedness, is? I speak of course of "invalidated" only in the sense of invalid against creditors and subsequent purchasers or mortgagees in good faith for valuable consideration; the mortgage being valid between the parties to it without registration. No reason has been given, nor can I imagine any, why all should be so invalid because one part is; nor has any case been referred to—and I know of none such—that gives support to the appellant's contention. *Reid v. Creighton* (1895), 24 S. C. R. 69, is not in point, and, if it were, would be rather against than in favour of that contention.

The case of *Hughes v. Little*, 17 Q. B. D. 204 and 18 Q. B. D. 32, in so far as it deals with the question of separability, favours, rather than is opposed to, the respondent's contention here. The Divisional Court, in the case of a security given for two purposes, held, under the legislation governing that case,

that the security was good for the one purpose and bad as to the other. The Court of Appeal decided that it was also bad as to the other, without dealing with the question of separability; each was invalid by itself. But, if the final decision had been that the good could not be saved from the bad, or, more correctly speaking, that the security was altogether invalid because not made in compliance with the provisions of the enactment there in question, that ruling would not govern this case; because the enactment there in question is so widely different from that here in question. There the mortgage must be in the form prescribed in the enactment; here no form of mortgage, or of its affidavits, is given: see *Ex p. Stanford* (1886), 17 Q. B. D. 259.

Kitching v. Hicks, 6 O. R. 739, though not in point, because in it one part only of the two in question needed registration, favours the respondent's contention. The statement of the general rule upon the subject of severing the good from the bad, made by Willes, J., in *Pickering v. Ilfracombe R. W. Co.* (1868), L. R. 3 C. P. 235, at p. 250, and referred to in *Kitching v. Hicks*, 6 O. R. at p. 752, 'is in these words: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality is created by statute or by the common law, you may reject the bad part and retain the good." I see no reason why that principle may not be well-applied to such a case as this: the purposes of the enactment in question are the protection of creditors and subsequent purchasers and mortgagees against undisclosed sales and mortgages; not to deprive purchasers and mortgagees, in no way invading that purpose, of their moneys or securities. Nothing but words making it necessary that the respondent should be deprived of his security in this case should justify any Court in depriving him of it. There are no such words in the enactment in question. I am therefore quite in agreement with the learned Division Court Judge in his opinion that, though the mortgage in question is invalid as to future indebtedness, it is good as a security for the existing indebtedness; and, accordingly, would dismiss this appeal.

MASTEN, J.:—I agree.

LENNOX, J.:—The appeal is from the judgment of the Junior Judge of the County Court of the County of Wentworth, holding

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that the claimant's chattel mortgage, so far as it relates to an indebtedness to him at the date of the mortgage, the 15th August, 1914, for \$12,291.10, is a valid security against John J. Hunt, an execution creditor of Montrose. I am of opinion that the judgment of the learned Judge is right.

The mortgage recites that Montrose is indebted to Long in the sum of \$12,291.10, and Long has agreed to advance Montrose further sums, by delivery of goods, to enable him to carry on business, to make up, with the present indebtedness, a total sum not exceeding \$13,000, within a period of one year from the date of the agreement, that is to say, the date of the mortgage. It is not disputed that every requirement of R. S. O. 1914, ch. 135, to constitute a valid mortgage securing the repayment of a present indebtedness, has been observed, and the *bona fides* of the transaction is not questioned; nor is it denied that the recitals are true in substance and in fact. The affidavit of *bona fides* in every way complies with the statutory conditions applying to a present indebtedness. It seemed to be assumed upon the argument that the recitals in the body of the mortgage are in every way the recitals necessary, for future advances, within the statute—the combined effect of the requirements of clauses (a) and (b) of sec. 6. This is nearly, but not absolutely, accurate; and, in my opinion, it is at least remotely important to notice that it is not recited that the agreement of the mortgagee with the mortgagor to make future advances is in writing, as required by clause (a) of sec. 6. There is no affidavit of the character provided for by sec. 6, clause (d). In the absence of this affidavit, the claimant admitted at the trial that he has not a registered mortgage to secure repayment of future advances, but a mortgage only for the actual indebtedness at the date of the mortgage, and the learned Judge has so found.

The execution creditor, however, contends that, by reason of the matters referred to, the mortgage is void *in toto* as against the creditors of the mortgagor; and he relies mainly upon *Hughes v. Little*, 17 Q. B. D. 204, 18 Q. B. D. 32, as decided in the Court of Appeal. This case does not help the appellant; on the contrary—so far as it is safe to take English decisions founded upon statutes widely differing from our Act in scope, provisions, and intent, as guides—it is an authority in favour of the claimant. It

is argued that the learned Judge erred in basing his judgment upon *Hughes v. Little* in the Divisional Court, and that he was not aware that the judgment of that Court, upon the question here to be decided, was reversed by the Court of Appeal. I do not know what is the fact as to this, but a careful reading of the cases convinces me that the judgment of Manisty, J., as to the points we are considering, is confirmed and strengthened by following the case to its final decision. Little was the execution creditor, and Hughes claimed to hold the goods of the debtor against him, under a mortgage given to Hughes as security for repayment of "£32 or thereabouts" which he had guaranteed for the debtor in case he had to pay it—a mortgage to secure an endorsement we would call it here—and a present indebtedness of £40. A Judge of a County Court decided in favour of Hughes, the mortgagee, as to both claims. Little appealed, and the appeal came on before Manisty and Mathew, JJ. The statutes governing the case were the Bills of Sale Act, 1878, and the Bills of Sale Act (1878) Amendment Act, 1882. The objections were: (a) the Act of 1878, sec. 8, required that the consideration be truly stated in the mortgage, and it was contended that it was not truly stated as to the guarantee; (b) as to the £40, the mortgage did not comply with sec. 9 of the amending Act of 1882. Mr. Justice Manisty, who delivered the judgment of the Court, held that the claims were to be treated separately, as if two mortgages had been given; and both or either might be valid or invalid. Treating the mortgage in this way, he found that upon both objections the appellant failed. Little accepted the decision that the claims could be treated separately, and the result upon the £40 claim, and appealed as to the guarantee security. The correctness of the method pursued was not questioned in the Court of Appeal. The questions then raised were: (a) Was the guaranteed liability sufficiently stated within the Act of 1878? (b) Did the mortgage comply with the scheduled form in the Act of 1882, requiring certainty as to the amount of liability and time of repayment? The answer to the first point was "Yes," to the second, "No."

How can it be argued that this judgment was in effect a declaration that the mortgage, being bad in part, was bad *in toto*? This case enunciates a principle; and this, and the reliance placed upon it and the evident misconception as to its effect, is my apology for dwelling upon it at such great length. Indeed, even

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as indicating general principles, if the difference between our Act and English legislation is not kept well in mind, English decisions are not likely to be helpful. As said by Osler, J.A., in *Marthinson v. Patterson* (1892), 19 A.R. 188, at p. 193: "I should be more impressed than I am with the forcible language of the judgment below if I could see as clearly as the writer seems to do that the object of the Imperial Legislature in passing the Bills of Sale Acts and the object of our Legislature in passing our Act was the same, and that the principle of the decisions of the English Courts upon the construction of the English Acts, was entirely applicable to the construction of our Act. I think it better to take our Act as it stands, without entangling ourselves in the maze of decisions upon the English Acts, the object of which, with all deference, is, as regards the Acts of 1878 and 1882, at all events, very different from that of ours. By those Acts it is required that the bill of sale shall set forth, or, which is the same thing, truly set forth, the consideration for which it was given, upon the penalty, under the Act of 1878, of being void against assignees and creditors, and under the Act of 1882, of being altogether void, even against the grantor: *Thomas v. Kelly* (1888), 13 App. Cas. 506." And, after referring to several cases, the learned Judge adds: "Manifestly these are decisions upon statutes passed, not as much in the interest of the borrower's creditors as of the borrower himself. As Bacon, V.-C., says of the Act of 1878 (and the Act of 1882 is an advance in the same direction): 'The intention of the Legislature was to endeavour to have a stop put, as far as practicable, to the fraudulent practices of lenders of money, and, but for that object, the provisions of the Act would, perhaps, not have been so severe and so strong as they are.'"

The object of our Act, and I think a preamble in the earlier Acts so declared, is to prevent creditors from being defrauded, and the intention is to restrict contractual powers so far as is necessary, and only so far as is necessary, to this end. The inquiry in this case, and in every case of the kind, should be, what is there in the Act in words or purpose which vitiates this mortgage security for an entirely separate claim, the honesty of the transaction being undisputed, and beyond dispute, and \$1,000 of which was paid upon the day of its execution? Treat it simply as a mistake, or surplusage, or the irrelevant recital of a purpose not fully executed, or as an unregistered mortgage binding upon

the parties *inter se*, but not otherwise, and it is manifest that it cannot operate to the prejudice of creditors; rather in proportion as it disappoints the assumed expectation of the mortgagee it works to the advantage of the creditors of the mortgagor.

Every line in the mortgage and every statement in the affidavit is true.

There is Canadian authority quite as direct as *Hughes v. Little* that a mortgage may be bad in part (illegal is the wording of the report) and good in part. In *Campbell v. Patterson*, 21 S.C.R. 645, the Chancellor found as a fact (see *Campbell v. Roche* (1891), 18 A.R. 646) that part of the consideration upon which the Mader mortgage was based was bad, and, following *Commercial Bank v. Wilson* (1866), 3 E. & A. 257, held that the mortgage was void *in toto* as against the creditors of Roche. This judgment was affirmed in the Court of Appeal. The Supreme Court held that the judgment of the trial Judge and that of the Court of Appeal were wrong as a matter of law. They found, however, as a matter of fact, that the consideration was wholly illegal, and the judgment, therefore, was not disturbed.

The consideration is that which the grantor received—the extension of credit, the cash loan of \$1,000, and the agreement and actual receipt of further advances—and not necessarily the amount secured to the mortgagee: *Ex p. Challinor* (1880), 16 Ch. D. 260.

Honest mistake does not, necessarily at all events, avoid the security. In *Marthinson v. Patterson* the mortgage should have been for \$2,000, and was taken for \$2,500. In *Hamilton v. Harrison* (1881), 46 U.C.R. 127, the overcharge was only \$117.20, but was still substantial in a transaction of about \$1,000. In *Biddulph v. Goold* (1863), 11 W.R. 882, the misstatement of the consideration could hardly be called a mistake, and was proportionately very large. At the time instructions were given, both parties thought the true amount was £350, and the bill of sale—treated as a mortgage—was drawn up in this way. Before execution of the instrument, it was discovered that the debtor—a nephew of the mortgagee—owed less than £244, but the mortgage was executed without alteration; the understanding being that the accounts would be adjusted later. The nephew became insolvent, and, a jury having found that the transaction was honest, the full

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Court held upon a reserved case that the mortgage *was not void in toto*, and allowed it to stand for the amount actually owing by the insolvent. Wightman, J., said: "I am of the opinion that in this case our judgment must be for the plaintiff. It appears that there had been a mistake in drawing up the bill of sale as to the amount which was due, but that, before the deed was fully executed, the parties knew that the sum inserted in the bill of sale was not the exact sum due, and that, knowing this, but still without any fraudulent intent . . . they executed the bill of sale. It seems to me to be too much to say that this deed is therefore void *in toto*."

See also *In re Isaacson, Ex p. Mason*, [1895] 1 Q.B. 333 (C.A.)

I think the appeal should be dismissed with costs.

RIDDELL, J:—I have given this case much consideration, and have not been able to satisfy myself as to the meaning of the legislation. While in this state of uncertainty, it is a satisfaction to know, if the law as laid down by my learned brethren is not what the Legislature intended it to be, it can be speedily changed—and it is in that view that I think it unnecessary to urge considerations against the conclusion of the rest of the Court.

While not sure that the correct interpretation has been placed upon the statute, or the right conclusion drawn from the English cases, I do not dissent—"gravely to doubt is to affirm."

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

Oct. 20.

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GRAY v. WABASH R.R. Co.

Feb. 4.

Railway—Injury to Person at Highway Crossing—Negligence—Contributory Negligence—Written Findings of Jury—Explanation of Foreman Orally in Court-room on Interrogation by Trial Judge—Effect of—Failure to Ring Bell or Sound Danger-whistle—Evidence—New Trial.

The plaintiffs, man and wife, were driving westerly along a country road, in a buggy with the cover up, in a snow-storm, when, in attempting to cross the railway track, at a point a little east of a station, they were struck and injured by the engine of a train of the defendants, also going west. The road was almost parallel with the railway up to the place of crossing. The plaintiffs had first to cross over a siding upon which were some box-cars which obstructed the view westerly, as did the station-building; but, before the plaintiffs reached the main track, they had a clear view westerly

of 550 feet. At the trial of an action to recover damages for the injuries they sustained, they swore that they looked westerly and saw no train. To the question, "Was there negligence on the part of the defendants . . . which caused the injury to the plaintiffs? If so, what?" the jury in writing answered: "We find that the" defendants "were negligent in so far as the evidence shews that the engine-bell was not sounding immediately prior to the arrival of the train at" the crossing "and in so far as a danger-whistle was not blown between the 550 feet range of vision immediately west of the place on the crossing at which the accident in question occurred." The jury also negatived contributory negligence. Being interrogated by the trial Judge as to the meaning of the finding of negligence, the foreman of the jury said that he could not go further than to say that the ringing of the bell "might have prevented the accident." The jurymen were not polled. The trial Judge dismissed the action, "not only upon the answers of the jury, but also because, on the undisputed facts, the whole occurrence was the result of their" (the plaintiffs') "own negligence in attempting to cross without looking for an approaching train:"—

Held (RIDDELL, J., dissenting), that the oral statement of the foreman ought not to be taken as overriding the deliberate written verdict of the whole jury; and that verdict should stand.

Held, also, that, although there was no statutory duty to sound the whistle within the 550 feet, failure to do so might well be negligence; and the jury were within their rights in finding that the plaintiffs' injuries were caused by the neglect of the defendants to sound the whistle, in the peculiar circumstances of the case.

Held, also, that the finding of the jury that the plaintiffs were not guilty of contributory negligence could not be said, upon the evidence, to be a finding which reasonable men could not conscientiously make.

Held, also, that the defendants were not entitled to a new trial; and that judgment should be entered for the plaintiffs for the damages assessed by the jury.

Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331, specially referred to.

Judgment of MIDDLETON, J., reversed.

Per RIDDELL, J.:—A very careful trial Judge having satisfied himself that he obtained the real meaning of the jury by the method he pursued, the Court should hold, as he did, that the non-ringing of the bell *might* have caused the accident, but the jury could not and did not find that it did; and such a finding could not support a judgment for the plaintiffs.

ACTION to recover damages for injuries sustained by the plaintiffs by being struck by a train of the Wabash Railroad Company, operated upon the line of the Grand Trunk Railway Company, while the plaintiffs were attempting to cross the line in a buggy. The action was against both companies.

October 4 and 5, 1915. The action was tried before MIDDLETON, J., and a jury, at Sandwich,

J. H. Rodd, for the plaintiffs.

H. E. Rose, K.C., for the defendants the Wabash Railroad Company.

D. L. McCarthy, K.C., for the defendants the Grand Trunk Railway Company.

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October 20, 1915. MIDDLETON, J.:—Upon the answers of the jury, there must be a verdict in favour of the Grand Trunk Railway Company; for no negligence has been found against them.

As against the Wabash Railroad Company the situation is not so simple. The action arises out of a collision between a Wabash train and a horse driven by the plaintiffs along the Tecumseh road. The railroad runs almost due east and west. The Tecumseh road also runs almost parallel with the railroad, but crosses it at the point in question, the crossing being a short distance east of the railroad station.

The train in question came from the west. The plaintiffs were also driving from the west; then they turned north-east to cross the track. They had first to cross over a siding some forty feet south of the track. Upon this siding were some box-cars, which, no doubt, obstructed the view westerly. The station-building also obstructed the westerly view; but, after the siding had been crossed, and before the plaintiffs had reached the main track, the undisputed evidence is that they had a clear view westerly of 550 feet. They say that they looked westerly and saw no train. There was no reason why the train could not have been seen; because, although snow was falling, the occupants of the dwelling on the other side of the Tecumseh road saw the train and realised the peril in which the plaintiffs were. Manifestly, if the plaintiffs had looked, as they say they looked, they must have seen the train, for they had not gone more than 25 feet before the engine struck their horse's head; so that undoubtedly they drove right in front of the approaching train.

This train was a heavy freight, made up of between 30 and 40 cars. The whistle was sounded as the train approached the station, but, according to the findings of the jury, the bell was not ringing immediately before the train reached the crossing, and no danger-whistle was blown between the station and the crossing.

In explaining the answers made by the jury, the foreman made it quite plain that they were not prepared to find that that negligence caused the accident. The foreman said, "I could not go further than to say that it might have prevented it."

Upon this, I think, the plaintiffs fail. To succeed, they must

establish not only negligence on the part of the defendants, but that that negligence caused the accident. The jury are not satisfied that the negligence found did cause the accident.

I can quite appreciate the point of view of the jury. The train in approaching the crossing must have made a great noise, yet this did not suffice to warn the plaintiffs. No one can say with any degree of certainty that the additional sound of the ringing bell would have been sufficient. It might have been.

For these reasons, I think the plaintiffs fail, not only upon the answers of the jury, but also because, on the undisputed facts, the whole occurrence was the result of their own negligence in attempting to cross without looking for an approaching train.

I trust that, under the circumstances, the defendants will not seek payment of costs.

The plaintiffs appealed from the judgment of MIDDLETON, J.

January 19. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. H. Rodd, for the appellants. The learned trial Judge erred in correcting the finding of the jury as to negligence of the defendants on the strength of his interrogation of the foreman subsequent to the written verdict. The written verdict should stand: *Jones v. Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331. The defendants were negligent, even though the statute does not make it necessary to sound the whistle within the 550 feet. It was not the Judge's province to find contributory negligence. The jury found that there had been none: *London and Western Trusts Co. v. Lake Erie and Detroit River R.W. Co.* (1906), 12 O.L.R. 28.

H. E. Rose, K.C., for the defendants the Wabash Railroad Company, respondents. The plaintiffs must shew that the negligence found caused the accident. This they failed to do. The jury did not find that the lack of ringing the bell or blowing the whistle was the cause of the accident, in the light of the foreman's explanation: *Herron v. Toronto R.W. Co.* (1913), 28 O.L.R. 59. "*Might have caused it*" does not support such a finding: *Ramsay v. Toronto R.W. Co.* (1913), 30 O.L.R. 127.

Rodd, in reply.

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February 4. MEREDITH, C.J.C.P.:—The jury in writing found that the plaintiffs' injuries were caused by the negligence of the respondents, and that the plaintiffs were not guilty of contributory negligence; and the findings were expressed in this, taken in connection with the Judge's charge, sufficiently clear and ample manner:—

"Q. Was there negligence on the part of the defendants, or either of them, which caused the injury to the plaintiffs? If so, what? Answer fully.

"A. We find that the Wabash Railroad Company were negligent in so far as the evidence shews that the engine-bell was not sounding immediately prior to the arrival of the train at Tecumseh road crossing and in so far as a danger-whistle was not blown between the 550 foot range of vision immediately west of the place on the crossing at which the accident in question occurred."

But, after their verdict had been so rendered, a discussion of the subject was entered upon by the Judge with the foreman of the jury, which ended, so far as the foreman was concerned, in these words:—

"The Foreman: Your Lordship, in the finding we thought that might have prevented the accident, even at that late date, had the bell been sounded or the alarm sounded within the last 550 feet, that that might have prevented the accident."

"His Lordship: Did you think it would have prevented the accident, or is it only a guess that it might have prevented the accident? Do you take the responsibility of saying that, in your opinion, it would have prevented the accident, or it would have?"

"The Foreman: I could not go further than saying it might have prevented it."

The trial Judge directed that judgment be entered for the respondents, notwithstanding the verdict: basing that direction upon the grounds: (1) that the statement of the foreman of the jury, which I have given in full, reversed the written verdict of the jury in favour of the plaintiffs; and (2) that the action failed, upon the whole evidence, because the plaintiffs were guilty of contributory negligence.

In my opinion, there was error in both respects.

I cannot think that the statement of the foreman, especially

when given in the course of a conversation, in which there was no time to weigh his words, ought to be taken as overriding the deliberate written verdict of the whole jury. No Judge, notwithstanding much experience in expressing publicly his views, would like to be tied down to every statement he makes during the trial or argument of cases; and how much less should a jurymen be so tied down—a jurymen much less able to express his thoughts with precision, and possibly without any experience in expressing them in public? The jury-room, after a proper charge, is the place where verdicts should be agreed upon. Nor can I understand how the expression of his own views by one juror, whether foreman or not, could rightly be considered not only as a verdict of the jury but also as contradicting and reversing the verdict of all of them, given in writing; and the more so now that an unanimous verdict is not required by law in civil cases.

Deliberate findings are not to be reversed upon undeliberated words, spoken as the words of one only of the twelve whose verdict it is. If the learned Judge had called the attention of the other jurors to the discrepancy, or supposed discrepancy, between the verdict rendered and the foreman's statement, it might have been explained; it might have been shewn that the foreman did not intend to convey, by the words he used, the meaning the Judge attributed to them; or that, though he did, the rest of the jurors, or at least ten of them, stood by their verdict.

Clearly, not enough was done to warrant a verbal reversal of the jury's written verdict—a verdict expressly accepted as clear and sufficient, until, almost casually, the quoted words of the foreman came out.

It would not have been at all difficult to have cleared up all doubt upon that subject; and, in any event, it would have been better to have made plain to the jury the meaning attributed to the foreman's statement by the Judge and how it seemed to him to conflict with their written verdict; and to have sent them back to consider the matter, and to alter their written verdict, if it were proper to do so.

This not having been done, their verdict, once duly rendered, ought to stand. The onus of shewing, and shewing clearly, that it was rightly reversed, rests upon the respondents; and all that they have shewn falls far short of any warrant for a reversal.

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The plaintiffs were driving in a highway running nearly parallel to the railway tracks, and were approaching an abrupt turn in the highway where it crossed the tracks; they were in a buggy with the "top" or hood, or cover, up; and so in a most difficult position for taking care of themselves against a train coming on behind them. The train which caused their injury was running slowly, under twenty miles an hour. The jury found, as they might reasonably have done, that the driver of the engine was guilty of negligence in not sounding the whistle of the engine, when within 550 feet of the crossing, as well as not ringing the bell, in order to warn whoever might be in the buggy, or otherwise on that highway, going to cross the tracks, that there was danger behind.

The jury may not have found that the driver saw the buggy and appreciated the danger; it was not necessary that they should; if he ought to have done both and did not, he was guilty of negligence; whilst, if the falling snow, or anything else, prevented him from seeing, yet knowing the danger of the place, they might still have found him guilty of negligence for not whistling, for taking chances, especially as the bell was not ringing.

Because the railway enactments do not make it a duty to sound the whistle within the 550 feet is no reason why failure to do so may not be negligence; if it were a thing which, in the proper performance of their duties, competent drivers—it would be negligent to employ incompetent drivers—ordinarily would not omit, the omission of it was actionable negligence; and the jury were quite within their rights in finding that the appellants' injuries were caused by the neglect of the company to sound the whistle, in the peculiar circumstances of the case.

But besides that negligence the respondents were guilty, according to the jury's findings, of neglect of the statute-imposed duty to ring the bell; and that negligence caused the plaintiffs' injury.

So the question here is not whether doubt was thrown upon the verdict, or what course the trial Judge should have taken of his own motion, in the interests of justice: the question is, whether, assuming that the judgment is wrong on the other ground upon which it is based—contributory negligence—the respondents are entitled to a new trial.

It has been said that a new trial is something in the nature of

a calamity; it is certainly an extreme hardship, especially upon persons such as the plaintiffs: it is enough to go once through the anxiety, wear and tear, and expense and inconvenience of a trial; a second trial, where one should be enough, cannot easily be excused; and ought never to be unless the rights of one of the parties, or the interests of justice, make it necessary: see *Dakhyl v. Labouchere*, [1908] 2 K.B. 325.

What rights have the respondents to a new trial? None that I can find.

The plaintiffs have a sufficient and unmistakable verdict in writing against them. Assuredly they cannot get rid of that by saying that the words of the foreman, speaking for himself, in the manner I have mentioned, throw doubt upon the written finding. As long as it stands, it binds them. The doubt should have been dispelled; as it might so easily have been dispelled, whether in their favour or against them, at their instance. If they desired to take advantage of it, they should have moved the Judge to reopen the question upon which doubt rested, and, with a further clear charge upon it, to direct the jury to reconsider it: or they might have asked to have the jury—not merely the foreman—polled. But they did not, and I can imagine only that they did not deliberately, fearing that such a course would remove all doubt to their disadvantage. And can any one have any doubt that it would?

The respondents were guilty of negligence in two grave respects, one the breach of a statutory duty, and the other the breach of what most men might think a very obvious duty, especially if the other were neglected, though not a statutory duty; and the plaintiffs were not guilty of contributory negligence. Is it within the range of possibility, even, that, in these circumstances, that jury, or any other, would, notwithstanding such negligence on the one side and care on the other, be unable to say that the negligence found by them caused the accident?

The findings of negligence are well supported by the evidence, especially the second one.

The respondents have wholly failed to shew any legal right to a new trial; and, as I see it, justice does not require it; an injustice would be done in directing it.

In the case of *Jones v. Canadian Pacific R.W. Co.*, 30 O.L.R.

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331, the Court of Appeal here was unable to discover any finding of the jury that the negligence proved was the cause of the accident, and so directed a new trial; but the Privy Council set that judgment aside and directed that judgment be entered for the plaintiff in accordance with the verdict: and that is only one instance of very many in which, accurately or not, the rule that a verdict once found ought to stand has been applied: and the great reluctance there is, very properly, in directing a new trial, except as a matter of right.

If granted, it could be granted, fairly, only as to the one question upon which doubt has been cast, the question whether—the respondents having been guilty of negligence in the two respects, and the plaintiffs not guilty of contributory negligence—the real cause of the accident was the negligence of the respondents in either respect: see the Judicature Act, sec. 29. As I have intimated, there can hardly be a possibility of the plaintiffs failing at such a trial; indeed I doubt whether the respondents would be willing to go to trial upon that issue only. Trials are costly: and generally have the like result in such cases as this: and who can say wisely that such a result in this case would be unjust?

There should not be another trial.

The ground upon which the learned Judge thought he was justified in directing judgment to be entered for the respondents, notwithstanding the verdict for the plaintiffs, was that the plaintiffs were, he thought, plainly guilty of contributory negligence—that they should have looked both ways for trains before crossing, and, if they had so looked, must have seen the train which caused their injuries, and should have avoided it.

Both swore very positively that they did look and kept on looking until the accident happened, but saw no train. So the Judge must have discredited their testimony in this respect.

There are cases in which obviously it would be negligent to cross a railway track without first stopping and looking out for trains and making sure that the way was safe; on the other hand, there are cases in which it would not be negligent: for instance, in the open country, where even the blind or deaf would know unless dreaming; that is, it would be that which persons ordinarily would do under the same circumstances; and so the question must nearly always be one for the jury.

If the short logic, "If you failed to look you were negligent, and if you looked and failed to see you were negligent," were always applicable, who could recover in respect of any level crossing accident? The measure of a man's duty is not what the "prophets after the event," or logicians, may say; it is but that which ordinarily is done under the like circumstances. It is not of much use to look if one be nearly blind or his vision obstructed by snow-storm, train, building, or any obstruction; nor, in such a case, is it necessarily negligent not to see if one look. Circumstances alter cases; and many circumstances may warrant an inroad upon this short and sometimes captivating logic.

The appellants were driving, in a buggy, with the cover up; the train that caused their injury was almost directly behind them; and both were approaching the awkward crossing, where the accident happened, in a snow-storm. Those who have never driven a horse at all, and those who have never driven in a buggy with the cover up, or in a snow-storm, may perhaps, with much confidence, apply the Lord Justice's logic, which I have quoted from memory and so perhaps not with verbal accuracy; but there are few jurors who have not, and so they must be the better judges; and in any case the subject is one within their province, which, in my opinion, was plainly invaded in that respect, as well as in determining the question of the veracity of the plaintiffs, man and wife. No one, in my opinion, reasonably can say that the jury, in finding distinctly and clearly that the plaintiffs were not guilty of contributory negligence, did that which reasonable men could not conscientiously do.

I would allow the appeal with costs, and direct that judgment be entered up in the action for the plaintiffs, and \$1,000 damages, with costs of the action.

I should add that I am sure my brother Riddell is under a misapprehension in thinking that the plaintiffs do not want a new trial if they cannot get more: all that was said was that both sides preferred to have the case finally dealt with by this Court if that could be done without a new trial.

LENNOX and MASTEN, JJ., concurred.

RIDDELL, J.:—An appeal from the judgment of Mr. Justice Middleton dismissing the action.

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Most of the facts are set out by the learned trial Judge in his careful judgment; I add only that the road upon which the plaintiffs were driving, forks, and, while one branch crosses the line of rail, the other proceeds towards the east, south of the railway.

The case was fairly left to the jury, and the jury found in answer to questions as follows (I quote the shorthand notes):—

“ . . . Jury return.

“His Lordship: In answer to the first question, ‘Do you find the defendant guilty of negligence?’—you find, ‘They were negligent in so far as the evidence shews the engine-bell was not sounded immediately prior to the Tecumseh road crossing, and in so far as the danger-whistle was not blown between the 550 foot range of vision immediately west of the place of crossing at which the accident occurred.’

“And then ‘Was there negligence on the part of the plaintiffs?’ ‘We find from the evidence given in this case that the plaintiffs observed the required precaution in approaching crossing at which the accident occurred.’

“Damages, \$1,000; \$500 to the husband, made up \$150 for the horse, \$15 for the harness, \$75 for the buggy, loss of labour, \$48, and doctor’s bill, \$212; and to the wife \$500.”

On Mr. Rose, counsel for the defendants the Wabash company, taking objection to the entry of judgment against his clients, this took place:—

“His Lordship: As I gather, there are two heads of negligence against your railway: first, that you did not ring the bell prior to the arrival of the train at the Tecumseh road crossing; and, secondly, that you did not blow the whistle within the 550 foot range of vision—as I gather from the whole presentation of the case, the not ringing of the bell was a failure to observe the statutory requirement; the not blowing of the whistle was a failure to do that which was reasonable and proper, having regard to the safety of the travelling public under the statutory requirement. Do I interpret rightly, Mr. Foreman?

“The Foreman: That is the interpretation—the possibility of the engineer seeing this man within the 550 foot range of vision.

“His Lordship: He ought to have seen him and ought to have blown the whistle to warn him off. I am afraid you will have to pay, Mr. Rose.

"Mr. Rose: There is no evidence at all that he did or could see the man.

"His Lordship: You yourself demonstrated that the man could have seen the engine, and it would follow that your engineer could see the man.

"Mr. Rose: That the man could see the engine? It does not follow that the engineer could see the man. The engineer is looking out of the window ahead, and is attending to his signals.

"His Lordship: The jury thought he could, or he ought to have seen the man approaching him.

"Mr. Rose: There was no evidence that he could.

"His Lordship: Looking ahead out of an engine-window?

"Mr. Rose: It would be the window in front—not out of a side window, and he is looking at signals which he has to observe.

"His Lordship: The brakesman, I think it was, said the range of vision would be much more than 35 feet outside of the line of track at 100 feet; at 500 feet was a greater distance; he could have seen as far as the station would let him.

"Mr. Rose: Then on the case, apart from the findings, of course, I asked your Lordship last night to reserve judgment. It seemed to me there was no evidence, even if you thought the evidence of these people that they did not hear the bell was evidence that there was not a bell—there was no evidence at all that that had anything to do with the accident.

"His Lordship: If there was any ringing of the bell, it might have given them a chance, it might have warned them off. . . .

"Mr. Rose: Unless there is some evidence that they would have heard the bell. There is no evidence from anybody else that they would have heard the bell there under the conditions as they existed there that day. The mere fact, supposing there is a statutory obligation, supposing there is a statutory duty broken, does not give a cause of action.

"His Lordship: I quite agree. I told the jury they must not only find the negligence, but that that negligence was the cause of the casualty. They say there was this train coming down, making a certain amount of noise, no doubt, and it would have made more noise if it had sounded its bell, and they have taken the view that these people might have been wakened out of their sense of security if the bell had been ringing.

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"Mr. Rose: Nobody could tell what might have been, but nobody has said they would have.

"Then, I submit, there is no evidence on which they could find as they have found, if they mean to include in that finding that the ringing would have done any good.

"His Lordship: Would have done some good.

"Mr. Rose: If they mean to find that the bell was not ringing, and the ringing of the bell would have done any good.

"His Lordship (to the jury): Is that what you mean, that you think that the ringing of the bell might have done some good to these people?

"The Foreman: Your Lordship, in the finding we thought that might have prevented the accident, even at that late date, had the bell been sounded or the alarm sounded within that last 550 feet, that that might have prevented the accident.

"His Lordship: Did you think it would have prevented the accident, or is it only a guess that it might have prevented the accident? Do you take the responsibility of saying that, in your opinion, it would have prevented the accident, or it would have?

"The Foreman: I could not go further than saying it might have prevented it.

"Mr. Rose: That is what I say; there is no evidence on which any one can say it would have.

"His Lordship: This is still open to you. I will have to think it over. At the present time I am inclined to think you will have to pay, but I will think it over."

(To the jury)

"Gentlemen, I want to thank you for the care and attention you have paid to the case and the evident appreciation of the situation. . . ."

After consideration, the learned trial Judge held that the answers of the jury, as explained in oral answers to his questions, did not import that ringing the bell would have prevented the accident; he also held that, on the admitted facts, the whole occurrence was the result of the plaintiffs' own negligence. My learned brother does not consider the first ground of negligence found by the jury, although much stress was laid upon it in argument before us.

If the answer of the foreman, made as it was, in presence of the

jury, after a considerable discussion had taken place, is to be taken as the answer of the jury, I think the judgment is right.

I assume that the jury, by the first answer, in form found that the non-ringing was one of the causes, and therefore the cause, of the accident; but what took place in Court must be considered in order to determine precisely what their real finding was. It is the final answer which should be taken: *Herron v. Toronto R.W. Co.*, 28 O.L.R. 59.

There is much to be said in favour of the view of the Chief Justice of the Exchequer in *Lowry v. Thompson* (1913), 29 O.L.R. 478, at p. 483: "When a jury, after mature deliberation in a jury-room, renders, as here, a verdict for one party, giving, as here, reasons therefor, and is then instructed, as here, by the trial Judge, on a crucial point, to reconsider their verdict, such reconsideration should, I think, take place in the privacy of the jury-room, and not in open court." It is, however, every-day practice for the trial Judge to ask the jury in open court for any explanation of their answers which he thinks proper to obtain; and, so far as my experience goes, the answer of the foreman is taken as the answer of the jury unless some jurymen dissent. No fixed rule should be laid down: trial Judges must obtain explanations from the jury in the best manner which occurs to them and with due regard to certainty and accuracy.

A very careful trial Judge has satisfied himself that he obtained the real meaning of the jury by the method he pursued; and I think we should hold, as he does, that the non-ringing of the bell *might* have caused the accident, but that the jury could not and did not find that it did. Such a finding cannot support a judgment for the plaintiffs: *Ramsay v. Toronto R.W. Co.*, 30 O.L.R. 127, and cases cited at p. 139.

If there were any real doubt that the foreman spoke the view of the whole jury, I should allow a new trial on that ground—but neither party wishes that course to be pursued.

The duty of the servants of the railway company to keep a lookout and to act by way of precaution, where persons are near the track, has been recently discussed at considerable length in *City of London v. Grand Trunk R.W. Co.* (1914), 32 O.L.R. 642, and I do not think it necessary to restate the legal propositions applicable.

I can find nothing in this case to shew that the engineman,

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even had he been looking, could have seen the likelihood that the plaintiffs would act as they did, in time to avoid the accident.

I would dismiss the appeal with costs.

Appeal allowed; RIDDELL, J., dissenting.

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[APPELLATE DIVISION.]

PEARSON v. CALDER.

Promissory Note—Consideration—Debt of Infant—Guaranty — Suretyship—Contract—Primary Liability.

A girl of 18, the sister of the defendant, made an arrangement with the plaintiff to purchase from her a millinery business and stock in trade; the infant was let into possession, and the plaintiff gave her a bill of sale of the goods and an assignment of the lease. The purchase-money was to be paid, out of the infant's own money, by her brother; but, after a delay, the brother refused to pay, and the plaintiff threatened to take back her property; subsequently the plaintiff desisted from her threat, on receiving from the defendant, who was the infant's elder sister, and of full age, a guaranty to pay the rent and a promissory note made by the defendant in favour of the plaintiff for part of the purchase-money; the infant remained in possession and carried on the business; she was not a party to the note. In an action upon the note, it was contended by the defendant that she was but a surety for the payment of a legal debt of the infant, and that there never was any legal debt, and so never was any liability on the defendant's part:—

Held, affirming the judgment of SNIDER, Co. C.J., Wentworth, that the defendant was liable.

Per MEREDITH, C.J.C.P.:—The debt evidenced by the promissory note was the debt of the defendant, and her obligation arising out of the transaction was not merely that of a surety for the payment only of a legal debt of her infant sister upon the sister's default in payment of it.

Harris v. Huntbach (1757), 1 Burr. 373, applied.

Per MASTEN, J.:—Even if the infant was the real purchaser, and primarily liable, and if both parties to the action contracted on the basis of knowing that she was an infant and not legally liable to pay, the obligation undertaken by the defendant was to pay in any event if the purchaser failed to do so, irrespective of whether such failure arose from infantile non-responsibility or from financial incapacity. Such a contract differs fundamentally from an ordinary guaranty ensuring payment to the creditor of whatever sum the principal debtor is legally liable to pay; and the rule invoked by the defendant has no application.

In the alternative, if the defendant knew the purchaser's age and the plaintiff did not, the situation was that the defendant, by giving a security now asserted to be valueless in law, induced the plaintiff to abandon rights which she was *bonâ fide* asserting. To permit her to do so would be inequitable.

Mutual Loan Fund Association v. Sudlow (1858), 5 C.B.N.S. 450, and *Wauthier v. Wilson* (1912), 28 Times L.R. 239, applied.

The proposition that, if the third party be not by law liable for the demand, as in the case of goods, not being necessities, furnished to an infant, the defendant's promise cannot be considered as collateral, may be doubted, in view of expressions of opinion in *Wauthier v. Wilson*, *supra*.

APPEAL by the defendant from the judgment of the Senior Judge of the County Court of the County of Wentworth, in favour of the plaintiff, in an action in that Court, for the recovery of \$300 and costs upon a promissory note.

The note sued upon was made by the defendant and given to the plaintiff, in the circumstances set out below, upon the sale of a business by the plaintiff to the defendant's younger sister, an infant; and the defence was, that the note was given to guarantee the payment of the purchase-price of the business, and that as a contract of guaranty it was invalid because the principal debtor was an infant and not legally liable.

The learned County Court Judge found that the defendant undertook a primary liability to pay for the business purchased.

January 19. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. S. MacBrayne, for the appellant, argued that she was surety only for the payment of her sister's debt; and, as the sister was an infant and not legally liable, the guaranty was invalid: *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778; *Williams' Notes to Saunders' Reports*, vol. 1, p. 234.

C. W. Bell, for the plaintiff, respondent, contended that the appellant was not a surety, but a principal debtor, who undertook a primary liability: *Harris v. Huntbach* (1757), 1 Burr. 373; *Baker v. Kennett* (1873), 54 Mo. 82; *Wauthier v. Wilson* (1912), 28 Times L.R. 239; *Duncomb v. Tickridge* (1648), Aleyn 94.

MacBrayne, in reply.

February 4. MEREDITH, C.J.C.P.:—The only ground upon which this appeal is brought here, and the only ground upon which it is now attempted to support it here, is that the appellant was in truth a surety only for the payment of a legal debt of her sister, and that there never was any such debt, and so never was any liability on the defendant's part.

At the trial it was urged also that, even if that were not so, there was no consideration for the making by the defendant of the promissory note in question, and so payment of it could not be enforced; but no such contention is made here, it could not reasonably be made: the goods and business in question formed

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the consideration, and it is quite immaterial whether the defendant herself took possession, and had the beneficial enjoyment of them, or let her sister have both.

The circumstances of the case are simple, and there was no conflict of testimony respecting any of the transactions upon which the legal rights of the parties depend. Neither the defendant, nor her sister, gave evidence at the trial; no witness was called for the defence.

The defendant's sister, who was about 18 years of age, had worked for the plaintiff, in her business of a milliner, carried on at Hamilton, with a branch shop at Brantford; and, desiring to go into business for herself, the sister approached the plaintiff with a view to obtaining first the Hamilton business, and afterwards that at Brantford: and eventually an arrangement was entered into for the acquisition of the Brantford business and the stock in trade there, by the sister, at what seems to have been a reasonable price, amounting to a little over \$300: and accordingly the purchaser was let into possession, and the plaintiff gave to her a bill of sale of the goods and an informal written assignment of the lease of the shop.

The purchase-money was to be paid by the purchaser's brother, out of her own money which he held in trust for her as her guar-
dian, except as to a small amount, in excess of the \$300, which the purchaser said she would herself pay. There was no expressed obligation on the part of the purchaser to pay the \$300 or any part of it; it was never intended that there should be; that money was to be paid in cash by the brother. After some delay, and some negotiations with the brother, the parties met in a solicitor's office, and the brother then refused to pay; and thereupon the plaintiff proceeded to take back her property, no one denying her right so to do; but, before that was done, the defendant, who is the purchaser's elder sister, and is of age, stepped into the breach to do that which the brother refused to do—pay the \$300. Not having the money, she gave the note in question, payable three months after its date, for the \$300; and the plaintiff accepted it, abandoning her intention, and the steps taken by her, to retake the property in question; and the younger sister remained in possession and carried on the business, the plaintiff having nothing to do with it after that, very reason-

ably considering herself paid for it by the defendant's note. The younger sister was no party to the note in question, nor indeed to the transaction between the plaintiff and defendant, in which the defendant was given three months' time for the payment of the \$300, instead of its being paid in cash in accordance with the first arrangement.

In these circumstances, how can the findings of the learned trial Judge—that the debt evidenced by the promissory note in question is the debt of the defendant, and that her obligation arising out of the transaction in question is not merely that of a surety for the payment only of a legal debt of her infant sister upon the sister's default in payment of it—be reversed here?

What we are asked to find is really this: that the parties, knowing of the sister's infancy and consequent incapacity to make a binding contract there, entered into an agreement by which the defendant got \$300 worth of property, for her sister, in consideration of a promise to pay that sum if the infant sister were in law bound to pay it and did not. Milliners may make fantastical "creations" in the way of their trade; but no milliner, nor any one else, would make such a ridiculous creation as that in the way of a contract to pay money.

Primâ facie the defendant is, in writing, over her own signature, alone liable for the payment of the amount of the promissory note in question. Between her and the payee of the note it is quite open to her to shew the whole transaction out of which the apparent obligation upon the note arose, to shew it for the purpose of proving that her obligation was merely a secondary one, a liability to pay only if her sister were primarily liable for the debt and made default in payment: but the whole transaction, as I see it, shews the opposite of that, shews that the debt to the plaintiff is hers and hers alone; whether her sister has or has not already saved, or may not hereafter save, her harmless from any loss. If the parties had not known of the infant sister's incapacity to make a binding contract, and had not excluded her on account of that, can any one doubt that she would have had something to say about the new contract made in consequence of failure to get payment from the brother, or that she would have been a party to the promissory note, as maker, with her sister as endorser? Solicitors had come into the transaction before the note was given.

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The case of *Harris v. Huntbach*, decided in the year 1757, 1 Burr. 373, was in principle quite the same as this case; and in it it was found that the promise created a debt—was not merely a promise to answer for a debt of another. In expressing their opinions, Lord Mansfield said: that the undertaking—of a grandfather to pay for work done in his grandson's garden—is clearly an original undertaking, and that it was indeed a matter of fact rather than of law: and Mr. Justice Foster added that “the infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant, to pay the money.” I do not understand that learned Judge to have at all meant that it could not in law be a guaranty, but that, as in this case, it was in fact impossible in the circumstances of the case, which were not as strong against the defendant there, I think, as the circumstances of this case are against the defendant here: see *Baker v. Kennett*, 54 Mo. 82; *Conn v. Coburn* (1834), 7 N.H. 368; and *Kun's Executor v. Young* (1859), 34 Penn. St. 60.

During the trial the plaintiff spoke more than once of the defendant as a surety; but whether that was because of the suggestion to her mind arising from the use of the word by counsel who desired its use, or not, it is not at all material; we have to decide what the defendant's legal position in the transaction was, not what the plaintiff called or miscalled it. But I may add that it was doubtless intended between the sisters that the younger should, and I have no doubt will, out of her own moneys, as soon as she can, if she has not already done so, or in as far as she has not, pay the money. One can hardly blame a milliner for using or adopting the use of the word surety as the plaintiff did. She professes to be artistic in the making of ladies' hats and bonnets, but not in the use of the English language.

As the defendant is, in my opinion, so plainly liable upon this view of the case, I do not stop to consider whether she would or would not be liable, even if only surety for a lawful debt of her sister, because the infant sister in such a case would be legally liable for the debt in question until she exercised her right to avoid it, and that she had not done when the note fell due, and indeed may not yet really have done. In the case of *Wauthier v. Wilson*, 28 Times L.R. 239, the money was borrowed by

the infant, and he was a joint maker with his father of the note there sued upon, yet the father was held liable. The fact that the Imperial enactment of 1874 (Infants Relief Act) makes the contracts of infants for the repayment of money lent or to be lent or for goods supplied or to be supplied, with some exceptions, "absolutely void," must be borne in mind when seeking light from cases decided upon contracts coming under that legislation.

The findings of the learned trial Judge cannot be disturbed, and under these the plaintiff is entitled to the judgment she has recovered against the defendant.

The appeal must be dismissed.

MASTEN, J.:—Appeal from the judgment of Snider, County Court Judge of Wentworth.

The action is on a promissory note for \$300 given by the defendant to the plaintiff.

The defence is that the transaction really consisted of a guaranty given by the defendant, and that such guaranty is invalid because the principal debtor was an infant and not legally liable.

The facts may be shortly stated. Marguerite Farmer, an infant of 18 or 19 years of age, bought, on or about the 1st May, 1915, from the plaintiff, a millinery undertaking which was then being carried on by the plaintiff in the city of Brantford, the purchase-price being three hundred and some odd dollars.

The purchaser stated to the plaintiff that her brother was managing the estate of her deceased father, that there was \$500 coming out of the estate to her, and she promised to get from her brother the funds necessary to pay the purchase-price, either in the form of cash or his note. On this promise by the purchaser, the undertaking and stock of goods were delivered to her, and she took possession and carried on the business from the 1st May.

On the 15th May, difficulty arose because the purchase-price was not yet forthcoming from the brother, and on that date the plaintiff threatened to retake possession. Subsequently, on the 1st June, the plaintiff desisted from her threat to retake possession on receiving from the defendant (who was a sister

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of Marguerite Farmer) a guaranty to pay the rent of the premises in which the business was carried on and a note for \$300, part of the purchase-price, the balance of the price to be paid in cash by Marguerite, who remained in possession.

The note so given is the note sued on in this action.

If the question fell to be dealt with exclusively on the basis of the finding of fact by the learned County Court Judge, that the defendant undertook a primary liability to pay for the goods purchased, I might have found difficulty in agreeing to affirm the judgment. But, without dissenting on that finding of fact, I think that in any case the defendant is liable.

(1) Even if Marguerite was the real purchaser, and primarily liable, and if both parties to the action contracted on the basis of knowing that she was an infant and not legally liable to pay, then I think the obligation undertaken by the defendant was to pay in any event if the purchaser (Marguerite) failed to do so, irrespective of whether such failure arose from infantile non-responsibility or from financial incapacity. Such a contract differs fundamentally from an ordinary guaranty ensuring payment to the creditor of whatever sum the principal debtor is legally liable to pay, and the rule invoked by the defendant has no application.

(2) In the alternative, if the defendant knew the purchaser's age and the plaintiff did not, then the situation is that the defendant, by giving a security now claimed to be valueless in law, induced the plaintiff to abandon rights which she was *bonâ fide* asserting to retake possession. To permit her to do so would be inequitable, and this point is covered by authority.

In *Mutual Loan Fund Association v. Sudlow* (1858), 5 C.B.N.S. 450, the defendant, being sued on a promissory note made by him, defended on the ground that he was really a surety, and had, by the action of the creditor, been released. Judgment passed against the defendant, and a new trial was moved for on the ground that the question whether he was a principal or surety must be ascertained by the terms of the instrument itself without the aid of extraneous evidence; and Byles, J., in his judgment says: "As between the makers and the payees of the note, at law both the makers are principals, and evidence would not be admissible to shew that one of them signed the instrument as

surety. But, in equity, if it be made to appear that the lender was cognisant of the circumstances, you may shew what the fact is. They become joint principals, or principal and surety, according to the facts."

In the case of *Wauthier v. Wilson*, 28 Times L.R. 239, the note was signed by a father and son, the latter being an infant. The note had been given for a present advance to the son. The father claimed to be a surety only, and to be free from liability because the son was an infant. Pickford, J., in the Court below, found that the father was a surety, but held him liable notwithstanding. The Court of Appeal found as a fact that the father intended at the time of the advance to become liable as a principal; but, even if he was a surety and not a principal, they would hold him liable. Farwell, L.J., referring to *Mutual Loan Fund Association v. Sudlow* (*supra*), says: "Since the Common Law Procedure Act an equitable plea might be raised in such a case on the ground that the circumstances were such that the Court of Chancery would have restrained the action as being against conscience. . . . If the nature of the transaction were as suggested the father could not . . . have maintained a bill in Chancery to restrain the action, and his equitable plea would come to nothing at all." Lord Justice Kennedy said that he agreed with Lord Justice Farwell that the equitable plea put forward on the part of the elder defendant could not be supported.

In the present case, the defendant signs the note in question as maker. There is no qualification of her liability on the face of the document. Her right to establish that she is a surety only, rests on the equitable principle above mentioned. The Judicature Act has made no alteration in rights, but only in procedure; and her equitable plea to be relieved from her common law liability as maker of the note, because she was a surety, would, in the circumstances indicated, have come to nothing.

Lastly, it has been laid down for many years that, if the third party be not by law liable for the demand, as in the case of goods, not being necessities, furnished to an infant, the defendant's promise cannot be considered as collateral: *Harris v. Huntbach*, 1 Burr. 373; *Duncomb v. Tickridge*, Aleyn 94, cited in DeColyar's *Law of Guarantees*, 3rd ed., p. 98, and in Pingrey on *Suretyship and Guaranty*, 2nd ed., para. 380.

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This doctrine was applied by Mr. Justice Kay in *Yorkshire Railway Wagon Co. v. Maclure* (1881), 19 Ch. D. 478, and by Mr. Justice Pickford in *Wauthier v. Wilson* (1911), 27 Times L.R. 582. The last two cases were otherwise dealt with on appeal, but without reversing the principle in question.

In view of the veiled doubts expressed by the Court of Appeal in *Wauthier v. Wilson*, 28 Times L.R. 239, I prefer to rest my conclusions on the basis first discussed rather than on this last point.

The appeal should be dismissed with costs.

RIDDELL and LENNOX, JJ., agreed in the result.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

McILWAIN v. McILWAIN.

Husband and Wife—Alimony — Judicature Act, R.S.O. 1897, ch. 51, sec. 34
—Cruelty—Findings of Trial Judge—Absence of Finding of Danger to Life,
Limb, or Health—Evidence—Appeal—Costs—Disbursements—Rule 388.

To justify a judgment for alimony on the ground of cruelty, there must be a finding that the cruelty proved was such as to cause reasonable apprehension of danger to the life, limb, or health of the wife; and where that was not found by the trial Judge—although an assault was proved—and there was no evidence upon which the appellate Court could so find, the judgment of BOYD, C., the trial Judge, awarding alimony to the wife, was set aside.

The jurisdiction of the Court is defined by the Judicature Act, R.S.O. 1897, ch. 51, sec. 34.

The case was a proper one in which to order all the costs to be paid by the husband; but the Court could not do more than compel the husband to pay the wife "the amount of the cash disbursements actually and properly made by her solicitor." Rule 388.

Per RIDDELL, J., review of the authorities; *Lovell v. Lovell* (1906), 11 O.L.R. 547, 13 O.L.R. 569, 571, specially referred to.

APPEAL by the defendant, the husband, from the judgment of BOYD, C., at the trial, in favour of the plaintiff, the wife, in an action for alimony, declaring her entitled thereto, by reason of the husband's cruelty, and directing a reference to fix the amount, with costs to the plaintiff.

January 21. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

D. L. McCarthy, K.C., for the appellant, argued that the findings of fact of the learned trial Judge were insufficient to support the judgment for alimony. There was not such cruelty shewn as would cause reasonable apprehension of danger to life, limb, or health of the wife, if she should again reside with her husband: *Lloyd v. Lloyd* (1914), 26 W.L.R. 722; *Willey v. Willey* (1908), 18 Man. R. 298.

J. C. Elliott, for the plaintiff, respondent, contended that the evidence bore out the findings. It would be dangerous for the wife to go back to live with her husband: *Hudson v. Hudson* (1914), 26 O.W.R. 688, 6 O.W.N. 503. The recent acts of violence revived the effect of those of years ago: *Rodman v. Rodman* (1873), 20 Gr. 428. Matrimonial cruelty need not be acts of physical injury, but may be mental intimidation: *Lovell v. Lovell* (1906), 13 O.L.R. 569.

McCarthy, in reply, distinguished the *Lovell* case on its facts.

February 4. MEREDITH, C.J.C.P.:—The findings of fact of the learned trial Judge are quite insufficient to support the judgment directed by him, at the trial, to be entered in favour of the plaintiff: a judgment, in effect, of divorce from bed and board, with alimony, and the custody of the children: that is, it adjudges the plaintiff's separation of herself from her husband, to be lawful, and compels him to pay for her separate maintenance, with the certainty that the children, who both went with her, will remain with her.

The findings are that the husband was guilty of cruelty—assault and battery—on the 24th June, 1914; and that there was "some proof" of former acts of cruelty "several years, five, six, or seven," before. After dealing with the evidence and making these findings, the learned Judge proceeded to charge himself as to the law in these words: "Where there are any acts of violence the Court intervenes, the Court can act; and the whole question is whether there was an act of violence, on this 24th June, which led to the woman leaving the house."

The power to award alimony in this Province is conferred upon the Court in these words: "The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the

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law of England to a divorce and to alimony as incident thereto or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which could entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the Court." The Judicature Act, R.S.O. 1897, ch. 51, sec. 34.

That the findings of fact are not sufficient to support the judgment is a statement hardly, if at all, questioned by any one. If an assault and battery alone gave a right of divorce of any character, divorce would be made very easy, and litigation such as this would be lamentably very frequent. Long ago the true foundation was stated in these words: "The causes must be grave and weighty and such as to shew an absolute impossibility that the duties of the married life can be discharged." What is lacking in the foundation of the judgment in question is any kind of finding that the cruelty proved was such as to cause reasonable apprehension of danger to the life, limb, or health of the wife.

If we can, upon the evidence adduced at the trial, add to the findings at the trial, or, more correctly put, if, upon the whole evidence, we can find facts sufficient to support the judgment, it is the plaintiff's right to have it supported in that way; but I am quite unable to do so, and am quite convinced that the trial Judge in his findings of fact put the case as much in the plaintiff's favour as fairly he could; and I adopt as expressing my own conclusion, after more than one sympathetic examination of the evidence—which sympathy one can hardly avoid where personal violence has been resorted to by a man against a woman—the conclusion of the learned trial Judge expressed in these words: "I see myself no reason why they could not live together in the future."

The assault was not an aggravated one; the man is in no sense vicious: there is no kind of evidence upon which I can attempt to supply the additional facts necessary to support the judgment. Two medical men were examined, as witnesses at the trial, without a tittle of evidence being adduced from either of them to warrant carrying the findings any further—their evidence has indeed the opposite tendency. The plaintiff, of course, gave some testimony which, if there were nothing to the contrary, if we were bound to accept all her views upon the subject expressed hysteri-

cally or otherwise, unquestionably would warrant a judgment giving her the relief which she seeks; but, if we did that, if we made the wife the judge of her own case, there would be no need of coming here at all to have the question of right to alimony tried. Did any one ever know of any wife, who quarrelled with her husband, not expressing the opinion that he was killing her?

I would allow the appeal and dismiss the action. The plaintiff should have all the costs we can compel the defendant to pay her—"the amount of the cash disbursements actually and properly made by her solicitor" only (Rule 388): but not as a reward for her conduct, or encouragement to any wife to bring an action for alimony on anything like the same grounds, nor as a salve for her bruises, for they were hardly serious enough to require it: but rather as a prophylactic for the husband, a preventive of bad manners, which began, in the instance in question, in what he calls "tickling" his wife, and ended the next day in a small swelling on the back of her head, whatever may have caused it. The most effectual cure for any disposition to lay hands, with any degree of violence, on his wife, is the certainty of a counter-assault upon his pocket, and a wounding of his purse, following. For an assault of no bodily consequence the man has been criminally prosecuted in a summary manner and fined and bound over to keep the peace; and after that compelled to journey through the full length of the provincial civil Courts, and, although successful there, is obliged to pay something towards the costs of her who carried on the civil as well as the criminal prosecution; and all his own costs besides. I am sure he won't do it again: and I am sure too that his, and his wife's, interests, their children's interests, and the public interests, require, as the trial Judge so strongly advised, even using these words, "If she won't go back it will probably be the means of wrecking him," that the household should be united again as soon as possible. There has already been quite too much smoke for so small a family explosion as that upon which all this double litigation—criminal and civil—has been based.

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RIDDELL, J.:—This is an appeal from the judgment of the Chancellor of the 8th June, 1915, in favour of the plaintiff in an action for alimony.

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The parties are both about 40 years of age, were married in 1897 and have two children, one a girl of about 15 the other a boy of about 11—they are of the farming community and lived together till July, 1914.

As the Chancellor says, the case “is certainly a very puzzling one upon the evidence:” and it will be safe to take what he has found—and perhaps what he has not found—as the basis for judgment.

Until the occasion of June, 1914, there had been a condonation of occasional acts of physical violence which “might have been overlooked if nothing else had occurred, because it was several years ago, and there was a period of time, several years, five, six, or seven years, in which there seems to have been no special outbreak of trouble between them.”

In June, 1914, the wife determined to leave the defendant's home.

On the 26th June, Friday, the plaintiff had found fault with her husband for not taking her and her daughter in to supper at a garden party—he was sulky over this, and, though they slept together that night, on the following day after dinner a squabble took place between them. The plaintiff says: “After we had finished our dinner, I had pulled my chair back from the table, and he got up from the table, and he looked quite angry-looking, and he come up by me and kept pushing me, and I told him to let me alone, that I was tired, and he kept on, and I told him again, and he started pounding me on the back of the head with his fist. I had turned my head around and went to get out of the road, and he kept at it. The last I can remember of I could not see and I don't know what happened after that.”

The defendant's story is, that there was some unpleasantness about their daughter on the previous day, and he adds: “One thing and another; I was not paying much attention to it. The next day we had a late dinner, about two o'clock, and after she had her dinner she was very cross, and I had to go round the table to go out the door, and she sat over here. I started to tickle her, just ran my hands up and down her ribs like this—she had no corsets on—and she rose up and she picked up a tea-cup and she was going to throw it and she set it down and she walked around the table to this side and she picked up two pieces of cake and she

rolled them like that, fine enough for the chickens, and she walked around the kitchen and she grabbed the girl in her two hands by the hair, and I thought she was going to pull her head off."

'His Lordship: She grabbed her daughter by the hair? A. She grabbed her daughter by the hair, and I said, 'Here, here, now, that is going too far,' and I got them separated, and she went at her own head and I caught her and pulled her hands out of that, because I was afraid she would pull the head clean off herself, and I got her hands out of her hair, and she grabbed the tea-pot and she struck for the kitchen—I don't know whether it was to get hot water, or what it was, but she made for the stove anyway, and she threw the lid of the tea-pot at me, and I ran and grabbed the tea-kettle so she would not get the hot water, and she threw the kettle at the ceiling, so I seen she was some place where she shouldn't be, and I got hold of her and set her on the lounge."

The daughter, who gave her evidence very clearly so far as we can judge, says:—

"We were sitting after dinner, and he come around and he started pushing her roughly, and she told him to go away, that she was tired, but he didn't go, and she got up from the table, and he hit her.

"Q. Where did he hit her? A. It was in the corner.

"Q. Where did he strike her? A. On the head.

"Q. What part of the head? A. Right in the back.

"Q. The back part of the head? A. Yes.

"Q. What was the effect? What happened? A. Well, he knocked her down."

The doctor, who arrived within half an hour, could not find any physical signs of injury, but the plaintiff was very much excited, complained of her head and kept repeating over and over again that she could not live with her husband: another doctor, who came in a few hours after, found a little swelling which might have been caused by pulling the hair, a trifling matter in itself in any case.

The Chancellor was, on that evidence, quite justified in finding that the defendant struck his wife on the back of the head with his fist: and I adopt the finding, pausing simply to say that the defendant cannot be congratulated on exhibiting much wisdom when—and if—he endeavoured to placate an angry and tired woman by tickling.

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If then the fact of such an assault justifies the wife in leaving her husband and obliges the Court to grant her alimony, her case is perfect.

There is no doubt as to the law of alimony, and each case must depend upon its own facts.

From the institution of the Court of Chancery in Upper Canada in 1837, it exercised jurisdiction to decree alimony in a proper case: *Soules v. Soules* (1851), 2 Gr. 299; and very early laid down that, to obtain such a decree on the ground of cruelty, the *sævitia* must tend to bodily harm or to the injury of the health, and in that manner render cohabitation unsafe: *Severn v. Severn* (1852), 3 Gr. 431, at p. 435: so that the wife cannot "safely return to her husband:" *Jackson v. Jackson* (1860), 8 Gr. 499, at pp. 505, 506: and that was the reason of the rule, both here and in England, that an isolated act of personal violence gave the wife no right to leave her husband: *Rodman v. Rodman*, 20 Gr. 428. "The law . . . lays upon the wife the necessity of bearing some indignities, and even some personal violence:" *ib.*, pp. 430, 431. "The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread:" *ib.*, p. 431, quoting Lord Penzance in *Milford v. Milford* (1866), L.R. 1 P. & D. 295. There must be a reasonable apprehension or a probable danger of personal violence: *Bavin v. Bavin* (1896), 27 O.R. 571, at p. 578, citing *Bramwell v. Bramwell* (1831), 3 Hagg. Eccl. 618, at p. 635.

It is useless to multiply cases—the law is authoritatively laid down in *Lovell v. Lovell* (1906), 11 O.L.R. 547: *S.C.* in appeal (1906), 13 O.L.R. 569. I adopt the criterion of Moss, C.J.O., p. 571—"a question on the facts whether the plaintiff has shewn that the defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated to permanently affect her bodily health and (or) endanger her reason, and that there is a reasonable apprehension that the same state of things would continue"—adding only the statement of Lord Stowell in *Evans v. Evans* (1790), 1 Hagg. Con. 35: "The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged" (p. 37.) This is substantially what is laid down in *Russell v. Russell*, [1897] A.C. 395.

I do not understand that there was any difference on the Bench in the *Lovell* case as to the law—but Mr. Justice Street in the Divisional Court and my Lord in the Court of Appeal differed from their brethren on the facts. We are not bound by any decision of any Court on the facts (except of course as *res judicata* or the like): we may, and, if we do our duty, must, exercise our own judgment upon the facts of the case before us—it will be seen later, however, that the facts are not identical in the two cases.

There were sporadic acts of violence years ago, and, though condoned, the recent act of violence revives their effect: *Rodman v. Rodman*, 20 Gr. 428; *Bavin v. Bavin*, 27 O.R. 571—there was no continued series of violent acts, much less anything indicating habitual loss of self-control by the husband, or cold, calculating malignity.

Notwithstanding all that has happened, the Chancellor finds: "I see no reason . . . why they could not live together in the future;" "if she is willing to forgive this and go back, they might still live together again." From an attentive reading of the evidence, I wholly agree in these conclusions—and this is what differentiates the *Lovell* case. There the Chancellor found as a fact that the plaintiff was almost a wreck, her constitution breaking down, ill-treatment would lead to a final break-down, and (11 O.L.R. at p. 561) "the husband was greatly to blame for the wife's unstrung condition, and that she had good and reasonable grounds to fear the worst if she continued to live under his influence . . . She had reasonable grounds to be apprehensive that both mind and body would give way in utter prostration . . . her health was exposed to peril without any adequate fault of her own,"

None of these is found by the Chancellor in this case: and the proof falls far short of establishing an "absolute impossibility that the duties of married life can be discharged."

Reasons there are in abundance why the Court should require strict proof on the part of the plaintiff—these I do not enter into, contenting myself with agreeing in that respect with the dissenting judgment in *Lovell v. Lovell* in the Court of Appeal.

Although the findings may be defective, we might supplement them on the evidence if that necessitated such a course: but, as

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has been said, I entirely agree with the Chancellor's conclusion as to the safety of a return to the husband's home. That being so, it is not, as, with great respect, I think, "for her to say:" it is her duty to return, and, refusing to return, she cannot compel her husband to pay alimony.

Were we able to deal with the costs with a free hand, I should be inclined to think that the defendant should pay all the costs—his own folly or worse is responsible for some, at least, of the trouble—but Rule 388 is imperative.

I am of opinion that the appeal should be allowed and the action dismissed.

LENNOX, J.:—I reluctantly concur in allowing the appeal. I do not question the correctness of the conclusions of my learned brothers, but regret that the jurisdiction of the Supreme Court, and the decisions which have grown out of the limited jurisdiction, not only justify the judgment about to be given, but perhaps make it logically inevitable. Not to go back further—although it can be traced back, I think, to the organisation of the Court of Chancery in 1837—by the Judicature Act, R.S.O. 1897, ch. 51, sec. 34: "The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto . . . and alimony when granted shall continue until the further order of the Court."

So long as the right to obtain alimony is practically put upon the same plane as the right to annul the marriage or obtain a divorce, or until we have a plain explicit enactment to the effect that the Court may grant alimony in any case in which it is made to appear, by satisfactory evidence, that the wife had good cause for separating from her husband (and, except in very exceptional cases, assault and battery or intentional physical injury, even if only on one occasion, might well be regarded as good cause), the old argument that a husband is entitled to thrash his wife occasionally, and, if at fairly long intervals, yet not be liable for payment of alimony, and the overworked doctrine of condonation, will be iterated and reiterated in the Courts, with effect, and sometimes, though not frequently, with tragic consequences. I am

not insensible to what has been so often, and so well, said as to the evil consequences likely to result, to the parties, to the family and to the State, if husband and wife are encouraged to live apart for trivial causes. It is all true, but there is another side to it, which I will not discuss now. I only desire to add, if I may say so with great respect, that it is disappointing to find that the very commendable effort of the learned Chancellor to bring about a reconciliation has been used as an argument that the trial Judge doubted the conclusiveness of the very facts upon which the judgment is based—an argument very emphatically repudiated in the *Lovell* case by Moss, C.J.O. (13 O.L.R. at p. 574); and my regret at feeling myself compelled, having regard to the terms in which our jurisdiction is conferred, and decided cases binding upon me, to concur in reversing a judgment otherwise so eminently just.

I think the appeal should be allowed and the action dismissed, and that the defendant should pay the cash disbursements actually and properly made by the plaintiff's solicitor: Rule 388.

MASTEN, J.:—In considering this case I have re-read the authorities cited and some others, but no useful purpose would be served by any statement by me of relevant legal principles which have been so often and so clearly stated before.

Where, as here, the case resolves itself into a question on the facts, and where it has been tried by so experienced a Judge as the Chancellor, one enters upon a consideration of the case with a strong expectation that the judgment is to be supported.

The judgment decrees alimony. The inference is that there is danger to the plaintiff in life, limb, or health, bodily or mental, or a reasonable apprehension of if, but the judgment contains no finding of fact to that effect. If it had, that would, in my opinion, have settled the question, because it is peculiarly a case where the finding of fact by the trial Judge ought not lightly to be disturbed. On the contrary, the Chancellor says: "I see no reason myself why they could not live together in the future. For the sake of the son and the daughter, I think she ought to consider that."

Such a suggestion could not be made if there was, in his opinion, danger to life, limb, or health, bodily or mental, or a reasonable apprehension.

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We thus derive two conflicting inferences from the judgment, without any positive finding, and are thrown back on the evidence without the aid of any finding.

Whether one forms an opinion on the evidence that the parties might advantageously try to resume domestic relations, or, on the contrary, that they might, with more benefit to themselves and their children, live apart by mutual agreement, is nothing to the point.

The wife has brought her action claiming alimony as her legal right; and whether or not she is entitled to judgment must depend, not on the Court's view of what is convenient or expedient in this particular case, but on whether the evidence in the case brings it within the fixed principles on which the Court acts in awarding alimony.

I have read and re-read the evidence with the view of discovering whatever would support the judgment.

Upon the best consideration that I can give the matter, I am of opinion that the evidence falls short of what is necessary to found successfully the plaintiff's claim.

So far as I can see, to grant relief in this case would be to extend rather than to apply the existing rules regarding alimony.

I think the appeal should be allowed and the action dismissed.

Appeal allowed.

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[APPELLATE DIVISION.]

Feb. 4.

MARSHALL BRICK CO. v. IRVING.

Mechanics' Liens—Mortgagee—"Owner"—Materials Furnished to Contractor—Request, Credit, or Behalf—Privity and Consent—Direct Benefit—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 2 (c), 8, 14.

The appellants, owners of land, sold it to I., two of the conditions of sale being that I. should build upon the land according to plans and specifications prepared by or for him, and that the appellants should advance to him a certain sum of money for the construction of the buildings. The work was done and materials supplied by I.'s contractor and his sub-contractors, and by workmen and tradesmen who sold materials to them. The appellants had nothing to do with these contracts nor any control over the contractor, sub-contractors, or workmen or tradesmen:—

Held, in an action for the enforcement of a mechanic's lien, brought by one of the tradesmen who furnished materials to I.'s contractor, that the appellants were in the position of mortgagees, by force of sec. 14 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140,

but were not owners within the meaning of "owner" as interpreted in sec. 2 (c)—the materials not having been furnished upon their request, credit, or behalf, or with their privity and consent, or for their direct benefit; and so they were without sec. 8, and within secs. 14 and 8 (3).

Per RIDDELL, J.:—Mere knowledge and non-interference will not render a mortgagee liable as an owner; each case is to be determined upon its own facts; and in this case there was nothing to shew that the materials were furnished at the request of the appellants.

Review of the authorities.

Orr v. Robertson (1915), 34 O.L.R. 147, explained.

Per LENNOX, J., review of the authorities; *Gearing v. Robinson* (1900), 27 A.R. 364, specially referred to.

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APPEAL by the defendants the York Farmers Colonisation Company Limited from the judgment of an Official Referee, in a mechanic's lien proceeding, finding the plaintiffs entitled to enforce a lien for bricks furnished to the contractor for the erection of houses upon the appellants' land, to the extent of \$573.52 and costs.

The appellants sold to the defendant Irving the land sought to be made subject to the lien, and advanced money to him to enable him to build. The position of the appellants in respect of mechanics' liens was fixed by the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 14(2), as that of mortgagees; but the Referee determined their status as owners by an application of sec. 2 (c) of the Act—because, as he said, the plaintiffs' materials were supplied at their (i.e., the appellants') request and with their privity and consent.*

*2. (c) "Owner" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

- (i) upon whose credit or
- (ii) on whose behalf or
- (iii) with whose privity and consent or
- (iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

8.—(1) The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

(2) Where the estate or interest upon which the lien attaches is leasehold the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of lien at the time of the registering thereof, verified by affidavit.

(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials,

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January 21. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

B. N. Davis and *W. Cook*, for the appellants, argued that they were in the position of mortgagees, and not of owners, their status being so fixed by sec. 14 (2) of the Mechanics and Wage-Earners Lien Act: *Garing v. Hunt* (1895), 27 O.R. 149. The learned Referee erred in finding that the appellants requested, within the meaning of the Act, the plaintiffs to supply materials or do work on the houses on the lands in question: *Cut-Rate Plate Glass Co. v. Solodinski* (1915), 34 O.L.R. 604; *Orr v. Robertson* (1915), 34 O.L.R. 147; *Webb v. Gage* (1902), 1 O.W.R. 327; *Slattery v. Lillis* (1905), 10 O.L.R. 697. The learned Referee erred in finding that the work was done and the materials furnished with the privity and consent of the appellants.

C. L. Fraser, for the plaintiffs, respondents, contended that the learned Referee was justified in determining that the appellants were owners. Where the materials were supplied and the work done to their knowledge, that amounted to a request, and made them liable as owners: Phillips on Mechanics' Liens, 2nd ed., p. 129; *Blight v. Ray* (1893), 23 O.R. 415. Where a vendor by his contract of sale authorises his vendee to erect a building, and a mechanic furnishes material or labour, a lien attaches to the vendor's interest in the land: *Henderson v. Connelly* (1887), 123 Ill. 98.

Davis, in reply, urged that knowledge of the work was not equivalent to a request, citing *Graham v. Williams* (1884-5), 8 O.R. 478, 9 O.R. 458.

the lien shall attach upon such increased value in priority to the mortgage or other charge.

14.—(1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.

(2) Where there is an agreement for the purchase of land, and the purchase-money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) Except where it is otherwise provided by this Act no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lien-holders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

February 4. MEREDITH, C.J.C.P.:—The main question involved in this appeal is: whether the appellants are owners of the lands in question, within the meaning of the word "owner" as interpreted in sec. 2, clause (c), of the Mechanics and Wage-Earners Lien Act.

The appellants were owners of the lands, and sold them to Irving, two of the conditions of the sale being: that Irving should build upon the lands according to plans and specifications prepared by or for him; and that the appellants should advance to him a certain sum of money to be paid by him for the construction of the buildings.

The whole transaction was a speculation, and one which fell through, like so many others, because of the war: and so there have been losses all around; and the question is: who is to bear them? Irving's rights have been forfeited; and the appellants now have their lands back again, with the buildings, as far as they have been built, upon them, and are out of pocket the amounts paid out by them under their agreement with Irving regarding advances for the construction of the buildings; and the contractors for, and workmen upon, the buildings, are largely unpaid for their work done, and materials supplied, in the construction.

The 14th section of the Act very plainly provides (sub-sec. (2)): that, in the case of an agreement for sale of lands with all or part of the purchase-money unpaid and no conveyance made, the purchaser shall, for the purposes of the Act, be deemed a mortgagor and the vendor a mortgagee: and that in this case, the appellants are to be deemed mortgagees: and the mortgage is prior to the liens: and in such a case, under sec. 14, sub-sec. (3), the lien attaches in priority to the mortgage upon the increased value of the land, caused by the work and material, but upon that only.

That, however, does not prevent mortgagees from being more than mortgagees, they are "owners" if they come within the definition of that word contained in the interpretation clause of the Act before mentioned. The definition is: one having an estate or interest in land upon which work is done or materials placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity and consent, or for whose direct benefit, the work is done or materials supplied.

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The work was done and materials supplied by Irving's contractor, Campbell, and his sub-contractors, and by workmen and tradesmen who sold materials to them. The appellants had nothing to do with these contracts nor any control over the contractor, sub-contractors, or workmen or tradesmen. Their dealings were with Irving only: they could keep him up to his obligations to them: but, apart from that, Irving was substantially owner of the lands and could do as he pleased.

That being so, how can the "mortgagees" be deemed "owners?" Nothing was done or supplied by contractor, sub-contractor, or workman, at their request or on their credit: Irving was in no sense their agent in making his contracts, the work was done at his request and upon his credit solely: so too on his behalf: the appellants were strangers to the building contracts of Irving with the builders: there was no privity and consent: and plainly it was not for their direct benefit, it was for Irving's direct benefit: all that the appellants could get would be an indirect benefit in the additional security they would have if the value of the lands were increased by the buildings more in amount than the sums they paid to Irving, under their agreement with him, towards the erection of the buildings: and so they are without sec. 8 of the Act, and within secs. 14 and 8 (3).

"Privity" must mean knowledge and acquiescence, for, if knowledge only were meant, that word should and would have been used, not the less familiar and perhaps ambiguous word; but, whether or not, the requirement of "consent" as well as "privity" makes the question unimportant.

The onus of proof of consent is upon the respondents: and clear the evidence should be when the result would be a judicial finding that a canny loan company, advised by a careful solicitor, gave a consent which was tantamount to saying "heads we lose, tails you win;" that is, if the speculation succeeded Irving should have all the profit, whilst if a failure his vendors' interest in the land should become chargeable with all his building debts.

It was known to all the larger lien-claimers that the appellants were, under the Act, in the position of prior mortgagees; it was known that the whole agreement between them and Irving, the mortgagor under the Act, was in writing and accessible to

them. They were in no sense misled by word or circumstance. They might, and should, have asked the appellants to consent, so that their position should be changed from that of prior mortgagees to that of "owners:" but they did not, and so, it seems to me, have much assurance in asking a court of justice to find as a fact that such a consent, never asked for, was given: and in a case in which it is difficult to see how, if it had been asked for, there could have been anything but a refusal.

Ordinary prudence would seek a written consent; less prudence a verbal one; and, as I think, there would be a great lack of any kind of prudence in being content with a tacit consent; though that would be enough. No one should be encouraged in taking a course, or neglecting an ordinary precaution, so that judge or juror has to grope about, in circumstantial evidence, for the very truth upon which the rights of the parties depend, in any matter of consequence.

No reason has been given, and no circumstance indicates, why the mortgagees, sure in the fair position in which the Act put them, should, in effect, guarantee the debts of Irving to his creditors, these respondents, who did not even take the pains to ask for any kind of assurance from them.

I would allow the appeal with costs; and, as the case now stands, would dismiss the action, without costs—without costs because substantially the whole trial before the Referee was as to the merits and amounts of the several liens claimed, in nearly all of which inquiries the appellants have failed; so that, but for the question raised here, and now decided in their favour, nearly all the costs of the action would fall on the lands, and so on the appellants. The radical question should first have been finally settled.

I said, as the case now stands, having in view what was called an abandonment of all claims if the appellants are prior mortgagees only. Notwithstanding the apparently unconsidered "abandonment," I would give leave to the respondents to apply here, within a week, for a reference of the case again, so that the claims of the respondents may be reviewed on the basis of the appellants being only prior mortgagees; or for leave to redeem as subsequent incumbrancers.

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Riddell, J.

RIDDELL, J.:— The York Farmers Colonisation Company Limited, on the 17th July, 1914, entered into an agreement with Irving for the sale to him of four lots on Edmund avenue for \$2,400, \$600 a lot, \$120 down and the balance on passing the deed: and, "whereas the said vendee desires to erect on the said premises four detached solid brick houses . . . according to plans dated—and requires to borrow money for that purpose," the company agreed to lend him money for the purpose "on the application of the vendee" as the buildings progressed—the vendee covenanted that the said houses should be built according to plans and specifications dated and signed by the vendee—the vendors to pass a deed a month after the houses were completed. After certain other provisions, it was expressly agreed that time should be of the essence of the contract; and, if work should be discontinued for two weeks, the vendors should have the right to take possession, the contract should become null and void, and all moneys paid and improvements made be forfeited as liquidated damages.

Irving went on to build, made contracts with material-men, &c., but did not finish the houses. Making default, the York company served notice of forfeiture and took possession, and Irving does not complain here.

A number of persons registered claims of lien: the Referee has allowed liens to the amount of over \$3,000: in default of payment of amount into Court, he ordered a sale of the land, and payment of the liens therefrom. The result would be that the York company, who furnished the money to erect (so far as they have been erected) the buildings, would lose their advances—and accordingly the company appeal.

The position of the company in respect of mechanics' liens is fixed by the statute, sec. 14 (2), as that of mortgagees: the Referee has, however, determined their status as owners by an application of sec. 2 (c) of the Act—because, he says, this work was done (1) at their request and (2) with their privity and consent.

I do not find myself able to agree in this conclusion.

It will be well to examine how far and in what direction we are bound.

The important cases are not numerous. In *Graham v. Williams*, 8 O.R. 478, Heney leased certain land to Williams with

an option to purchase and the right to build (given orally)—but, while Heney agreed to supply two-thirds of the money required for building, by way of a loan to Williams on the security of the property, “there was no agreement between Williams and Heney that Williams should build the house for Heney” (p. 481). Williams began to build, the plaintiff supplied him with bricks, and was not paid. Heney knew that the work was going on, but took no part in it in any way: the Chancellor decided that, though the work might turn out to his advantage, it was not for his “direct benefit.” He further thought that merely permitting a tenant to build, &c., as in the case under consideration, would not be satisfying the requirements of the statute as to “privity and consent”—and it is in connection with “privity and consent” that the statement is made. “The Act contemplates a direct dealing between the contractor and the owner” (p. 482.)

This judgment was affirmed by a Divisional Court, 9 O.R. 458—Proudfoot, J., at p. 461, thought “the privity and assent must be in pursuance of an agreement,” and that the case did not come within the statute. Ferguson, J., agreed; but in *Blight v. Ray*, 23 O.R. 415, he indicates that the expressions used are not of general application (p. 421.)

In *Gearing v. Robinson* (1900), 27 A.R. 364, the McGees were owners of the leasehold of certain land, the buildings upon which were partly burned; they leased to the Robinsons for part of the term, with permission to the sublessees to make changes in the internal arrangements of the buildings, and the sublessees were to erect, &c., buildings, the McGees advancing some part of the expenditures. The McGees do not seem to have interfered at all in the building, although they knew it was going on. Judge McDougall held them liable as “owners;” but this decision was reversed by the Court of Appeal. No “privity and consent,” it was considered, had been shewn, “and there was no evidence of any request by the sublessors, nor of any dealing of any kind between them and the plaintiff” (p. 372). On p. 371, apparently, approval is given the rule laid down in *Graham v. Williams*, that to render any person, other than him for whom the building is being erected, liable, “there must be something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged.” This very vague statement

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seems to be the correlation of what immediately precedes—"mere knowledge of, or mere consent to, the work being done is not sufficient"—if so there can be no objection to the statement, which probably was advisedly left in this vague form, unnecessary as it was to the decision, since the element of request was wanting.

The unreported case of *Tennant Planing Mill Co. v. Powell*, referred to in *Gearing v. Robinson*, will be found in the Printed Cases in the Court of Appeal in the general library at Osgoode Hall, vol. 111—it is quite a different case from this, turns on a question of fact and is not helpful.

All these decisions are decisions of fact, the sole law laid down with precision being that mere knowledge of or mere consent to the work is not "privity and consent." With that I wholly agree; but, beyond that, it seems to me that there can be no precise general rule laid down, and that each case must be determined upon its own facts.

It was urged that a recent case took the law further—at least made it more definite. I wrote the judgment of the Court in that case: it affords a very good illustration of the importance of getting into the atmosphere of a case: most if not all of the difficulty arises from the perhaps undue brevity of the report—a fault not too common, and readily overcome.

This case of *Orr v. Robertson*, 34 O.L.R. 147, does not lay down any such proposition of law as has been argued. "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case:" *Quinn v. Leathem*, [1901] A.C. 495, at p. 506, *per* Halsbury, L.C.

In *Orr v. Robertson*, Tyrrell was the lessee of certain property in the city of Toronto for a long term (nearly 20 years). He sublet for 10 years to Hyland, and by a contemporaneous agreement Hyland agreed to have plans, &c., prepared by his architect for buildings upon which the lessor was to expend \$11,500. These plans were to be submitted to and approved by the lessor, Tyrrell, and thereupon the sublessee was to build, paying the balance of the cost himself, it being understood that at the end of the sub-term the buildings were to belong to Tyrrell. Tyrrell went over

the plans with the architect and approved them: thereafter he was frequently consulted about the building, and took such part in ordering some of the work that the Referee held him personally liable for \$3,870: and the Divisional Court sustained this finding: Tyrrell also took out the building permit. There was no dispute or controversy that the work had been done with his privity and consent—the facts were abundantly proved—outside of the personal liability, the argument on the appeal was solely on the question of “request.” So far as that part of the work was concerned, for which he had rendered himself personally liable, of course the request was clearly proved: but it was argued that, as to the remainder of the work, the request was wanting. We thought that there was no need of a personal request by Tyrrell to the contractor, but that the exaction by him of a contract that Hyland should build was, in the circumstances of the case, a sufficient implied request, i.e., taken in connection with the signing by him of the plan, the taking out by him of the building permit, &c. The language, “even if Tyrrell took no further or other part in the matter,” refers to such acts of interference as rendered him personally liable, which had been the subject of our consideration immediately before, and not to the circumstances already spoken of. We did not, and did not intend to, lay down any general rule—and the generality of the language employed must be restricted.

Much of this explanation is given in *Cut-Rate Plate Glass Co. v. Solodinski*, 34 O.L.R. 604, at p. 607—but (*mea culpa*) it should have been made perfectly clear in the report itself.

In the *Solodinski* case, Blanchard, the owner of certain land, sold to Solodinski: Solodinski went on to complete certain buildings commenced by Blanchard, employing the T. Eaton Company to do certain work. Blanchard knew of this, visited the place once or twice a week, but what the T. Eaton Company did was not done at his request, express or implied, &c., and the Referee's holding that the T. Eaton Company could not look to Blanchard was supported by the Divisional Court.

With the law that mere knowledge and non-interference will not render a mortgagee liable as an owner, and that each case is to be determined upon its own facts, I can find nothing in the present case to shew that the work in question was done at the

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request of the company: the decision of the Referee should be reversed with costs here and below.

LENNOX, J.:—This is an appeal by the York Farmers Colonisation Company Limited against the judgment of R. S. Neville, Esquire, K.C., Official Referee, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

The principal question raised is, whether the York company are to be treated as mortgagees simply of the lands in question, or is their interest in these lands, as regards liens, to be placed upon the same footing as the interest of the contracting owner, the defendant Harry Irving, as the judgment in appeal declares? It is not claimed that the York company are personally liable.

The York company were the owners of the lands in question, and on the 17th July, 1914, agreed to sell them to the defendant Irving for \$600 a lot, or \$2,400 in all, and, reciting the payment of \$1 thereon, the company agreed to lend Irving \$6,400, being \$1,600 in respect of each lot, for the purpose of enabling him to erect a semi-detached brick dwelling-house upon each, of a character defined by the company, and according to its plans and specifications, at intervals as the work progressed, and in the manner in the agreement specified.

The agreement, amongst other things, also provides that Irving is to satisfy the company that the advances have been put into the buildings, and that there were no liens thereon. Irving agreed to pay taxes and insurance. The buildings were to be commenced by the 20th July; two of them to be completed by the 20th October, and the other two by the 20th November, 1914. Time is made of the essence of the agreement; and if at any time the work was discontinued for two weeks the company could take possession, and all moneys paid and improvements made are forfeited to the company, and the agreement becomes null and void.

The title is to remain in the company; and one month after completion, and upon Irving paying the purchase-money and all advances with six per cent. interest, the lands are to be conveyed to him.

I have not yet seen the agreement, and do not know whether the giving and acceptance of a mortgage is provided for. No conveyance or mortgage, however, has been executed.

Without the aid of the statute, I would not have come to this conclusion as to the relation created between the parties; but sub-sec. (2) of sec. 14 definitely says that, in a case of this kind, "the purchaser" (Irving) "shall, for the purposes of this Act, be deemed a mortgagor and the seller" (the company) "a mortgagee."

Therefore, it is not open to question that at the date of this transaction, the 17th July, 1914, and at the time Irving and Campbell began to obtain credit, the relation between these two principal parties was that of mortgagor and mortgagee. *Cook v. Belshaw* (1893), 23 O.R. 545, shews that whether an instrument is "a prior mortgage," within the meaning of sub-sec. (3) of sec. 8, is not determined by the date of registration, but upon the question of whether as a matter of fact it existed prior to the time the liens arose. It is, therefore, quite clear that not only was the relationship that of mortgagor and mortgagee, as I have said, by force of sub-sec. (2) of sec. 14, and that the statutory mortgage thereby created was "a prior mortgage," within the terms of sub-sec. (3) of sec. 8, but it follows that, by reason of this sub-section, if this is all, liens can only attach to the estate of the mortgagee if the selling value of the land is increased by the work, services, or materials performed or placed upon mortgaged land, and then only upon such increased value in priority to the mortgage.

There was no evidence of increased value.

The result is that if, at the time of its execution, the agreement was a statutory mortgage, and so continued, and if there is nothing more than this, then not only is the company's interest as a mortgagee overcharged, as claimed upon the argument, but the company's interest in the land is not liable at all: *Broughton v. Smallpiece* (1877), 25 Gr. 290; *Patrick v. Walbourne* (1896), 27 O.R. 221; and *Cook v. Belshaw* (*ante*).

But there may be something more, and I think there are other important questions to be considered; and as to these questions the status of the company does not in any way depend upon the character or extent of their interest in the land as a question of fact. I have dealt only with the case of a prior mortgagee who does nothing. It may be unwise for a lessor or lessee, remainderman, joint tenant, or tenant in common, or mortgagee, or any

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one having only a remote or limited interest in land, to put up costly buildings; but there is nothing to prevent him from doing it.

The further question then is, have the defendant company made themselves liable as "owners" within the terms of sec. 6 and sub-sec. (1) of sec. 8 of the Act, under the conditions set out in clause (c) of sec. 2? Upon a careful consideration of the scope and object of these provisions, I have come to the conclusion that they have not.

A hasty reading of *Orr v. Robertson*, 34 O.L.R. 147, might suggest that the company are liable; but that case is clearly distinguishable from the matters pertinent to the decision of this appeal; and the principles enunciated in *Gearing v. Robinson*, 27 A.R. 364, apply here, and have not, so far as I can discover, been departed from. This case was expressly followed in *Webb v. Gage*, 1 O.W.R. 327: and, although not specifically referred to in the judgment, was followed in this Court in the recent case of *Cut-Rate Plate Glass Co. v. Solodinski*, 34 O.L.R. 604.

For these reasons, I think that the judgment of the learned Referee must be set aside.

But it may be that the mortgagee's interest was increased in value by the work done upon the property; and, although at the trial Mr. Fraser abandoned any claim upon this head, he did so because of too great faith in a contention upon which he fails. It would not be right to hold him to this.

The action should be referred back to the Official Referee for further evidence, if this is desired; and the question as to whether the mortgagees are entitled to have their *primâ facie* liability, if any, reduced by the amount put into the buildings—proceeds of the loan—need not be considered, in fact does not arise, as the matter stands at the present time. It may be that the lien-holders should have a right to redeem secured to them, if this is necessary.

MASTEN, J., agreed in the result as stated by the Chief Justice.

Appeal allowed.

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COOK v. KOLDOFFSKY.

Mechanics' Liens—Claims of Lien-holders—Claims of Mortgagees—Priorities—Increased Selling Value—Protected Payments or Advances—Mechanics and Wage-Earners Lien Act, R. S. O. 1914, ch. 140, secs. 8 (3), 14, 21—Registry Act, R.S.O. 1914, ch. 124—Application of.

Sec. 8 (3) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, deals with the land itself, or with an estate or interest in it, which may be possessed by persons to whom the description of "owner" is applied under sec. 2 (c); and "prior" mortgages or charges are those which existed upon the land or upon an estate or interest therein before the work or the furnishing of materials began.

Kennedy v. Haddow (1890), 19 O.R. 240, and *Cook v. Belshaw* (1893), 23 O.R. 545, followed.

As against the prior mortgagee or chargee, the lien is not given upon the land, but upon the value produced by way of increase over that which the land itself previously had, by the subsequent doing of the work or placing of the materials; and the increased "value" is not the cost of the work or materials, but what is thereby added to the selling value.

Under sec. 14, the increased value is not an element; sec. 14 deals with priorities among competing claims, all arising after the work or the furnishing of materials has been commenced, and upon land and buildings together.

There being in the Act a definite provision (sec. 14) dealing with mortgages, whether registered or unregistered, and declaring that payments or advances under them may be defeated by a registered or unregistered lien, either by notice in writing of such lien or by registration of a claim for such lien, that provision overrides any other right accruing or arising out of the Registry Act, R.S.O. 1914, ch. 124, which deals solely with priorities as between registered instruments; and the application of the Registry Act is, by sec. 21 of the other Act, predicated upon registration.

Applying these principles, the finding of a Referee that the liens of the plaintiff and other claimants had priority over the appellants' mortgages, upon the increased selling value of the land, to the extent of the amount of the liens, was set aside, and the priority of the mortgages, so far as they were in respect of protected payments or advances, established—the amount for which the mortgagees claimed priority being reduced.

APPEAL by the defendants E. J. Kaake and James Kaake, mortgagees, from the judgment of an Official Referee, in an action to enforce a mechanic's lien, finding the liens of the plaintiff and other claimants established, and giving them priority over the appellants upon the increased selling value of the land.

January 11. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

G. T. Walsh, for the appellants, argued that they were protected by the Registry Act; that there was no proof of actual notice to them: *Wanty v. Robins* (1888), 15 O.R. 474; and that the onus was on the lien-holders to shew that the selling value of the property had been increased so as to give priority to their

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claim: *Cook v. Belshaw* (1893), 23 O.R. 545. He referred to sec. 8, sub-sec. (3), of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140; also to sec. 21; and to *West v. Sinclair* (1892), 12 C.L.T. Occ. N. 44; *Reinhart v. Schutt* (1888), 15 O.R. 325; *Rose v. Peterkin* (1885), 13 S.C.R. 677, *per* Strong, J., at p. 694; *Cut-Rate Plate Glass Co. v. Solodinski* (1915), 34 O.L.R. 604.

W. A. McMaster, for the plaintiff and other lien-holders, respondents, contended that the case of *Cook v. Belshaw*, *supra*, was not applicable, as it was the case of a building loan, properly so-called. He referred to *Eadie-Douglas v. Hitch & Co.* (1912), 27 O.L.R. 257.

S. H. Bradford, K.C., and *J. H. Campbell*, for other lien-holders, respondents, contended that certain moneys included in the appellants' claim had not been "advanced" within the meaning of the statute.

A. Cohen, for other lien-holders, respondents, argued that the appellants had actual notice of the liens; and that *Wanty v. Robins*, *supra*, was the case of an innocent purchaser, and was not in point.

Walsh, in reply, as to the position of the lien-holders, one lien being registered before the mortgages, referred to secs. 14 and 32 of the Act.*

*Sections 8 and 14 of the Act are as follows:—

8.—(1) The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

(2) Where the estate or interest upon which the lien attaches is leasehold the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of lien at the time of the registering thereof, verified by affidavit.

(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

14.—(1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.

(2) Where there is an agreement for the purchase of land, and the purchase-money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) Except where it is otherwise provided by this Act no person entitled

February 7. The judgment of the Court was delivered by HODGINS, J.A.:—The Official Referee finds the liens established and has given them priority upon the increased selling value of the land, which increase he puts at the exact amount of the liens. The mortgagees object to the priority given, while a counter-attack is made on their position as to some of the mortgage-moneys.

One of the mortgagees, E. J. Kaake, owned the lands, and had agreed to sell them to Joseph Rosenfeld. Whether or not he conveyed them to him before payment of the amount due is not clearly shewn; but on the 20th May, 1914, Rosenfeld granted them in fee to Koldoffsky, and the latter makes all the mortgages in question as owner. He admits, however, that he is only a chargee, and that the real owner is Rosenfeld. This the mortgagees were aware of, through their solicitor, before any money was advanced on these mortgages, and the evidence is sufficient to satisfy me that they had actual notice of the liens when the four mortgages were registered and the moneys advanced thereunder.

The mortgages are five in number. One, described as a temporary one, is dated the 17th July, 1914, registered the 18th July, 1914, for \$1,050, to James Kaake; and the other four, for \$1,125 each, are upon the several houses on the land, two being held by James Kaake and two by E. J. Kaake. They are all dated the 1st September, 1914, and registered the 4th September, 1914. Prior to their registry, and subsequent to the registration of the \$1,050 mortgage, Brown Bros. registered a lien for \$182.55. All the other liens and the certificates of *lis pendens* were registered subsequently. In this action all lien-holders have proved their claims, and no question of parties nor other technical objection has been raised.

The financial transactions regarding these mortgages are as follows. On the \$1,050 mortgage James Kaake advanced \$886.37 on the 20th July, 1914, by his solicitor's cheque. This is produced, and is payable to J. & S. Rosenfeld or bearer. The solicitor

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to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lien-holders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

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swears that J. Rosenfeld got the cheque. There is no endorsement nor any proof as to who actually got the money, but it is presumed that J. Rosenfeld obtained it. Koldoffsky apparently raises no objection, and it may have been spent in paying for work or material on the building. Then \$101.08 was paid by the solicitor to George Kaake on the 23rd July, 1914. The balance, \$62.55, was retained, it is sworn, for interest from the 17th July, 1914, to the 1st September, 1914, when the mortgage was paid off. There is no rate of interest specified in the mortgage.

As to the four mortgages of the 1st September, 1914, two of these were on the west pair of houses, in favour of E. J. Kaake. He retained out of the moneys secured by these two mortgages the sum of \$1,618.13 for principal and interest due himself on the agreement of the 28th April, 1913, whereby he had sold the whole of the land to Rosenfeld. He, or rather George Kaake for him, gave a cheque for the balance, \$631.87, to his solicitor, who thereupon paid George Kaake the sum of \$803.20. This more than absorbed the \$631.87. George Kaake said that this amount was due to him for moneys due by Rosenfeld, some details of which he gives. Out of the mortgages on the two east houses James Kaake retained the amount of the \$1,050 mortgage, and handed over \$1,200 to his solicitor, who had to draw from it, towards the \$803.20 paid to George Kaake, the sum of \$171.33, leaving \$1,028.67. Of this, amounts totalling \$943.67 were paid for work on the four buildings, leaving \$85, which the solicitor retained for money due him by Rosenfeld and for his fee in "placing" these mortgages.

None of these items were objected to before us, except: (1) \$1,618.13; (2) \$1,050; (3) \$803.20.

As to (1) and (2) the point made was that they were in fact prior charges or mortgages under sec. 8, and as to (3) that it was not a proper advance as against the lien-holders, because the mortgagees and the payee were aware that there were liens existing, although, except that of Brown, not registered.

As to (1), it was not a "payment or advance" under the mortgages, but its inclusion therein meant that the mortgagee took another security for its payment. When the work began, it formed a prior charge; and the right of the lien-holders in this action to have it so treated could not be modified by the action

of the mortgagee, who released his vendor's lien as against the owner of the land; nor could its satisfaction by the taking of the subsequent mortgages prevent it from being, as to lien-holders, a prior charge within sec. 8: see *Locke v. Locke* (1896), 32 C.L.J. 332, *per* Ferguson, J.

The judgment in appeal has allowed as against the mortgagees the whole amount of the liens as a prior charge on the increased selling value, which is equivalent to a finding that the selling value was increased to that extent. No claim in this respect is made in any lien or by any statement of claim, but the mortgagees were parties to the proceedings, and the appeal was argued as if it had been properly before the Referee. If there were any evidence at all directed to this issue, the judgment might be supported; but, under the circumstances, the matter must be referred back to allow the evidence to be given if the parties desire.

It may, therefore, be proper to deal with the question of priority on increased selling value, so that, when it is resumed before the Referee, it may be properly dealt with.

The provisions of sec. 8 (3) and those of sec. 14 are not necessarily in conflict. Section 8, sub-sec. (3), deals with the land itself, or with an estate or interest in it which may be possessed by persons to whom the description of "owner" is applied under sec. 2 (c); and prior mortgages or charges, under the decisions, mean those mortgages or charges which existed upon the land or those interests before the work began, because by sec. 6 the lien attaches then, and it may then be at once registered (sec. 22): *Kennedy v. Haddow* (1890), 19 O.R. 240; *Cook v. Belshaw*, 23 O.R. 545. The lien given as against the prior mortgagee or chargee is not, however, given upon the land, but upon the value which has been produced by way of increase, over that which the land itself previously had, by the subsequent doing of the work or the placing of the materials; and this value is not that which represents the actual value or cost of the work, etc., in itself, but the amount which it adds to the selling value.

Under sec. 14, the lien has priority over mortgage advances made after the lien-holder has notified the mortgagee in writing of his lien or has registered it, and in the latter case the lien-holder is deemed a purchaser *pro tanto* and within the provisions of the

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Registry Act and the Land Titles Act, the application of which is, however, limited (sec. 21).

Under sec. 14, the priority gained is on the estate of the owner or mortgagee in the land itself, and is positive, and is irrespective of any increased value given to the selling value by the work done, and so is not within the provisions of sec. 8, although the mortgage has priority by virtue of the Registry Act: *McVean v. Tiffin* (1885), 13 A.R. 1.

"Prior," in sec. 8, means before the work, etc., commences, because the land dealt with is described as incumbered land, and the nature of the incumbrance as a prior mortgage or charge. The reason why the increased value is not an element under sec. 14 is well explained by the Chancellor in *Cook v. Belshaw* (*ante*). It is paid for by the mortgagee by the periodical payments which are supposed to reach the lien-holders until they, by the registration of their lien, give notice that they are unpaid. It would be impossible to hold that a mortgage or charge or part of it which became "prior" by virtue of the Registry Act, under sec. 14, was a "prior mortgage or charge" in whole or *pro tanto* under sec. 8. To do so would present the curious spectacle of a mortgage or charge, prior in whole or in part as an incumbrance upon the land and buildings, as against the lien, and yet subsequent to it in whole or in part as to the increased selling value. The priority acquired under sec. 14 over the lien is upon the land, including the buildings and erections thereon. Both the lien and the mortgage are, therefore, charges upon the same thing; and, as increased selling value is derived from the buildings or erections, it cannot exist as a separate element under the conditions of that section. The true principle is to treat sec. 8 as confined to those mortgages and charges which existed before work began, by reason of which increased selling value may arise, and sec. 14 as dealing with priorities among competing claims, all arising after work has commenced, and upon land and buildings together.

Whether the increase in the selling value upon which the lien is given, when once ascertained, is affected by the result of an actual sale, is not now before the Court, and it is unnecessary to express any opinion upon the subject.

An example of a case where the selling value was not increased by work done subsequently is to be found in *Kennedy v. Haddow* (*ante*).

Applying these considerations to this case, the mortgagee E. J. Kaake must be held, as to the \$1,618.13, to be holder of a prior charge to that extent.

As to (2) the evidence as to the advances thereunder is very unsatisfactory. The mortgage is dated the 17th July, 1914, and is registered on the 18th July, 1914. From the evidence given, work was then going on and material being delivered, as Brown, the Watt company, Lantz & Silver, had all commenced some time previous to July, 1914. Cook began about August, 1914. If the mortgage had been discharged, and the amount included in the subsequent mortgage, it would be postponed to the liens. But I think the mortgagee can resort to the \$1,050 for priority if he can establish it. Some more satisfactory case must, however, be made shewing an actual *bonâ fide* payment or advance of the \$886.37, with the assent of Koldoffsky, to the Rosenfelds for the purpose of the buildings. The same remarks apply to the propriety of the payment to George Kaake of \$101.08, which needs to be more definitely established.

It is probable that the amount included for interest will not be maintainable. As the case must go back, I am disposed to allow this mortgagee a further opportunity to prove a prior claim under sec. 14 for this \$1,050, at his own expense, if he can. It is not, however, a prior charge within sec. 8.

As to (3) the remaining amounts purporting to be secured by the mortgages, it is clear that as to those two held by E. J. Kaake the balance of \$631.87 was more than exhausted by the payment of \$803.20 to George Kaake. It was his cheque for that amount that was brought to the solicitor, and the reasonable inference is that he got it back. As to James Kaake's mortgages on the two eastern houses, the payment of the balance of \$171.33 (part of the \$803.20) stands in the same position as the \$631.87. The whole \$803.20 was, however, paid out by the mortgagees, and the question arises whether anything short of written notice or registration will enable the lien-holders to dispute its priority to the liens other than that of Brown. The provisions of sec. 14 are definite. The lien has priority over "all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided."

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By sec. 21: "Where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act."

Registration, under sec. 21, enables a lien-holder to secure the advantages given under the decisions upon the Registry Act which prevent a prior registered instrument holding its position if the person claiming under it had actual notice of the lien before its registration. See *McVean v. Tiffin*, 13 A.R. 1; *Reinhart v. Schutt*, 15 O.R. 325; *McNamara v. Kirkland* (1891), 18 A.R. 271.

Under sec. 14 actual notice is not provided for, but only registration, or in lieu thereof written notice. If under it actual, though not written, notice were sufficient, then it would be idle to specify that the notice must be in writing, for that is necessarily actual notice. And, when the alternative to written notice is registration, it cannot be said that actual notice will suffice, or that payment before registration has not priority, as stated in the section, but has priority only if made before registration without actual notice. The Registry Act does not apply to a lien unless it is registered, for its application is by sec. 21 predicated upon registration; and, if registered, the protection in sec. 14 is absolute. While a registered lien-holder is a purchaser *pro tanto*, and within the provisions of the Registry Act, sec. 21 restricts the application of that Act to him unless the Mechanics and Wage-Earners Lien Act otherwise provides. That Act only gives him the status of a purchaser whose right to interfere with a prior instrument depends upon actual notice of the instrument, i.e., the lien when registered (sec. 72 of the Registry Act, R.S.O. 1914, ch. 124) or upon the absence of actual notice to him of a prior unregistered instrument.

It seems to me, where there is in the Mechanics and Wage-Earners Lien Act a definite provision dealing with mortgages, whether registered or unregistered, and providing that payments or advances under them may be defeated by a registered or unregistered lien in one of two ways, that such a provision overrides any other right accruing from or arising out of the Registry Act, which deals solely with priorities as between instruments. The fact that the Mechanics and Wage-Earners Lien Act merely confers the status of a purchaser *pro tanto* upon a

registered lien-holder, and excludes the Registry Act in other respects, indicates that where there is a specific provision in the former Act it must be read as exclusive of any other provision of the Registry Act.

While actual notice was shewn, there was no written notice proved here, and, except in the case of the Brown lien, no prior registration of any lien; and so the payment of \$803.20 becomes a protected payment or advance. And this will apply to the payments making up the \$1,050 mortgage, if they are satisfactorily established. The remaining items, \$1,028.77, almost all of which were paid to other lien-holders, are not, apparently for that reason, attacked, and must, therefore, be allowed as protected payments on the mortgages, which as to them will stand prior to all the liens, except the Brown lien, which was registered before the mortgages. This leaves the position of the mortgagees in this way:—

E. J. Kaake (1) holder of a prior charge under sec. 8 for \$1,618.13.

E. J. Kaake (2) holder of two mortgages for the two west houses for \$631.87, as to which he is prior to all liens other than the Brown lien.

James Kaake (1) holder of a mortgage on all the houses for \$1,050, or so much thereof as is proved to have been in fact advanced to or on account of the mortgagor or Rosenfeld, as to which he is prior to all liens.

James Kaake (2) holder of a mortgage for \$1,200 on the two east houses, which is prior to all the liens except the Brown lien.

The appeal must be allowed. The judgment will be set aside except in so far as it finds the amounts of the liens which are not disturbed. The matter will be referred back to enable the Referee to deal with the claim made by the lien-holders to have priority on the increased selling value, and with the priority or otherwise of the \$1,050 mortgage, and to pronounce the proper judgment. The present judgment directs the Master in Ordinary to conduct the sale. If this is an error, it may now be corrected.

The parties should bear their own costs of the appeal, as, while the mortgagees succeed as to the increased value, the amount due them has been varied.

Appeal allowed.

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[APPELLATE DIVISION.]

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Landlord and Tenant—Lease—Acceleration Clause—Chattel Mortgage—Assignment for Benefit of Creditors—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38 (1)—“During”—“Due”—Distress—Landlord’s Preferential Claim for Arrears of Rent—Extent of—Fraud on Assignments and Preferences Act, R.S.O. 1914, ch. 134—Apportionment Act, R.S.O. 1914, ch. 156, sec. 4.

G. was the tenant of a farm owned by the defendant, under an indenture of lease for a term of three years from the 1st January, 1914, at a rent of \$500 for 1914, \$600 for 1915, and \$600 for 1916; half of each year’s rent was payable on the 1st October and the other half on the 31st December. The lease contained a covenant that if (among other things) the tenant should make a chattel mortgage or an assignment for the benefit of creditors, the then current year’s as well as the next ensuing year’s rent should immediately become due and payable, and the term thereby granted, at the option of the lessor, immediately become forfeited and void, and that such accelerated rent might be recovered in the same manner as the rent thereby reserved. During the term, G. made two chattel mortgages, one on the 11th January, 1915, and the other on the 1st May, 1915. On the 7th September, 1915, G. made an assignment to the plaintiff for the general benefit of creditors; and on the 9th September, 1915, the defendant distrained the goods and chattels on the farm for \$1,200, which he asserted to be, by virtue of the acceleration clause and by reason of the giving of the chattel mortgages, due and in arrear, being the rent for 1915 and 1916. By sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, “In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises.” In an action for an injunction to restrain the defendant from selling the goods seized:—

Held, by BRITTON, J., the Judge of first instance, that the defendant was entitled to a preferential lien only in respect of one year’s rent; and an appeal by the defendant from that conclusion and a cross-appeal by the plaintiff were both dismissed (MEREDITH, C.J.O., and MAGEE, J.A., dissenting), with the variation that the money realised from the sale of the goods by the plaintiff (as directed by BRITTON, J.), less the expenses of the sale, should be paid into Court to abide further order.

Held, per Curiam, that by the sub-section quoted the right to distrain is not taken away.

Per GARROW and MACLAREN, JJ.A.:—The lien is reduced to one year’s rent if so much or more is owing, that is, not more than one year’s arrears prior to the assignment, whether actual or accelerated, can be claimed; “during” in the sub-section has the meaning of “for.” The acceleration clause is not to be regarded as fraudulent and void as against creditors.

Per HODGINS, J.A.:—The sub-section is intended to prevent priority for accelerated rent beyond three months from the execution of the assignment; the intention is to restrict and not to enlarge or accumulate rights of distress. *Langley v. Meir* (1898), 25 A.R. 372, should be followed. The acceleration clause is not to be considered a fraud upon the Assignments and Preferences Act.

Per MEREDITH, C.J.O.:—The sub-section does not interfere with the common law right of the landlord to distrain; it merely limits the extent of the arrears for which he may distrain. The effect of the acceleration clause (if effect was to be given to it) was that, upon the happening of any of the events mentioned in it, the rent for the current year and the year following became due and payable, and the defendant was entitled to distrain for the two years’

rent—that is, arrears of rent due “during the period of one year next preceding . . . the execution of the assignment:” sec. 38 (1); it was, for the purposes of the sub-section, none the less rent in arrear during the period mentioned because an assignment had been made. The acceleration clause, however, was void, at all events as against the plaintiff, as a fraud upon the Assignments and Preferences Act, R.S.O. 1914, ch. 134. *In re Hoskins and Hawkey* (1877), 1 A.R. 379, should be followed. It was immaterial that it was by reason of the chattel mortgages, and not of the assignment, that the payment of the rent was accelerated. The whole proviso was void by reason of the provision for acceleration in the event of an assignment being made; and the defendant should be restrained from proceeding further with the distress.

Per MAGEE, J.A.:—The case is governed by *Linton v. Imperial Hotel Co.* (1889), 16 A.R. 337. The defendant was entitled, at any time after the chattel mortgage, to have distrained, as clearly as if the whole \$1,200 had been originally made payable on the 1st May, 1915. The acceleration proviso is not void: although the acceleration by mortgage is contained in the same clause as the acceleration by assignment, they are severable. The distress for \$1,200 was justifiable, and the defendant, having once obtained the money, could hold it. Construction of sec. 38, consideration of the meaning of the word “due,” and application of the Apportionment Act, R.S.O. 1914, ch. 156, sec. 4.

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MOTION by the plaintiff to make perpetual or continue until the trial an interim injunction.

September 27, 1915. The motion was heard by BRITTON, J., in the Weekly Court at Toronto.

Hughes Cleaver, for the plaintiff.

G. T. Walsh, for the defendant.

October 15, 1915. BRITTON, J.:—Motion by the plaintiff to make perpetual, or continue until the trial of this action, an injunction order, made in September last, as an interim order, restraining the defendant, his bailiff, servants, and agents, from proceeding by distress and sale of the goods and chattels which were the property of one James Lawrence Goodbrand, who was the tenant of the defendant, Watson. The plaintiff is the assignee of Goodbrand, under a general assignment for the benefit of the creditors of Goodbrand, which assignment is dated the 7th September, 1915. The lease from the defendant to Goodbrand is dated the 16th January, 1915, for the term of three years from the 1st January, 1914, making the rent payable as follows: \$500 for the year 1914, \$600 for the year 1915, and \$600 for 1916, the first of such payments to become due and to be made on the 1st October, that is to say, \$250 on the 1st October, 1914, and \$250 on the 31st December, 1914, \$300 on the 1st October, 1915 and 1916, and \$300 on the 31st December, 1915 and 1916. The rent

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for 1914 had been fully paid before any seizure was made. The defendant seized for the full amount of rent for 1915 and 1916. The defendant asserts his right to do this by reason of what his tenant did in giving chattel mortgages, and other things, in violation of certain covenants contained in this exceptionally full form of lease.

The defendant contends that, not only as against his tenant Goodbrand, but against the assignee for the benefit of creditors of Goodbrand, and notwithstanding sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, he is entitled in priority to the full two years' rent down to the end of 1916.

All the facts are fully set out in the affidavits and papers filed on this motion; and, my opinion being that the defendant is wrong in his contention, the proper thing to be done is to treat this motion as a motion for judgment. This I do, and the order will be to restrain the defendant from proceeding with the distress and sale of the goods and chattels of the tenant Goodbrand. The defendant will withdraw from seizure, and all the goods and chattels seized as the goods and chattels of Goodbrand must be delivered by the defendant to the plaintiff—to be dealt with by the plaintiff as assignee for the benefit of creditors of Goodbrand. As the plaintiff, by his solicitor, was willing to concede to the defendant his right to priority to the extent of one year's rent, that is to say, for 1915, being for rent which fell due on the 1st October, 1915, and which would, had there been no seizure and no alleged breach of the covenants contained in the lease, fall due on the 31st December, 1915, the order will be that the plaintiff do recognise the defendant's claim to the extent of one year's rent in priority to the claim or claims of creditors.

This will be without prejudice to any claim the defendant may establish for damages by reason of any alleged breach of covenants in the lease—such claims if established not to have priority, but to be claims to rank *pro ratâ* with other unsecured claims against the Goodbrand estate. The defendant should pay the costs of these proceedings, which I fix at \$50, including costs of the action and of the motion for the interim injunction.

The plaintiff will pay to the defendant, out of the proceeds of the sale of Goodbrand's goods and chattels, the sum of \$600 in priority to payment of any amount to unsecured creditors. If

the defendant does not pay the sum of \$50 for costs as now ordered, that sum shall be deducted from the \$600, paying only the balance to the defendant.

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The defendant appealed from the judgment of BRITTON, J., and the plaintiff cross-appealed.

November 11 and 12, 1915. The appeal and cross-appeal were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

G. T. Walsh, for the defendant, referred to *Linton v. Imperial Hotel Co.* (1889), 16 A.R. 337, 346; *In re Hoskins and Hawkey* (1877), 1 A.R. 379; *Mason v. Hamilton* (1872), 22 U.C.C.P. 190, reversed on appeal, p. 411; *Graham v. Lang* (1885), 10 O.R. 248; *Langley v. Meir* (1898), 25 A.R. 372; *Eacrett v. Kent* (1887), 15 O.R. 9; Cassels' Ontario Assignments Act, 4th ed., p. 150; *Baker v. Atkinson* (1886), 11 O.R. 735, reversed on appeal (1887), 14 A.R. 409; *Lazier v. Henderson* (1898), 29 O.R. 673; *Tew v. Toronto Savings and Loan Co.* (1898), 30 O.R. 76. If the defendant is considered not to be entitled to the preferential lien which he claims for \$1,200, then he claims as an ordinary creditor in respect of that amount. The learned trial Judge should not have granted an injunction, and should have given the defendant the declaration which he asks for, and to which he is entitled.

Hughes Cleaver, for the plaintiff, referred to Cassels, *op. cit.*, p. 150; *Brocklehurst v. Lawe* (1857), 7 E. & B. 176; *Railton v. Wood* (1890), 15 App. Cas. 363; *In re Hoskins and Hawkey*, *supra*; *Ex p. Mackay* (1873), L.R. 8 Ch. 643; and argued that the *Linton* case, *supra*, was not applicable. The sale had not been sufficiently advertised. The clause in question is in reality a penalty clause, and void against creditors.

Walsh, in reply, argued that the defendant had elected not to forfeit, and so was entitled to distrain: *Kennedy v. MacDonell* (1901), 1 O.L.R. 250.

February 7. GARROW, J.A.:—Appeal and cross-appeal from the judgment on motion for judgment of Britton, J.

The action was brought by the plaintiff, as assignee for the benefit of creditors, under an assignment dated the 7th September,

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1915, of one James Goodbrand, for an injunction to restrain the defendant from selling certain goods and chattels, the property of the assignor, under distress proceedings instituted by the defendant against the assignor two days after the date of the assignment.

The assignor was the tenant of the defendant under an indenture of lease dated the 16th January, 1915, for a term of three years from the 1st January, 1914, at the rent of \$500 for the year 1914, and \$600 for the year 1915, and \$600 for the year 1916; the first of such payments to become due on the 1st October then next, that is to say, \$250 on the 1st October, 1914, \$250 on the 31st December, 1914, \$300 on the 1st October, 1915 and 1916, and \$300 on the 31st December, 1915 and 1916.

The lease contained a covenant that if (among other things) the tenant made a chattel mortgage, the then current year's as well as the next ensuing year's rent should immediately become due and payable, and the term thereby granted, at the option of the lessor, immediately become forfeited and void, and that such accelerated rent might be recovered in the same manner as the rent thereby reserved.

On the 11th January, 1915, some days before the date of the lease, but during the term therein mentioned, the debtor gave a chattel mortgage, and on the 1st May, 1915, he gave another; with the result that the defendant, claiming that, by reason of the acceleration clause before referred to, the rent for the last two years of the term (the first having been paid) had become due, distrained for the whole.

Britton, J., held that the defendant was entitled to a preferential lien only in respect of one year's rent, and from that conclusion the defendant now appeals, and the plaintiff cross-appeals upon the ground that the allowance should be reduced to six months.

The statutory provision on the subject is contained in R.S.O. 1914, ch. 155, sec. 38 (1), and is as follows: "In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises."

The clause in question has been frequently under consideration in the Courts, but I have been unable to find that the exact point now raised has ever been determined.

In *Linton v. Imperial Hotel Co.*, 16 A.R. 337—upon which counsel for the defendant relied—it was held that a landlord might distrain for rent thus by agreement accelerated, but the only rent there in question was rent for the then current year. It is true that in the course of his judgment Osler, J.A., refers to the earlier case of *In re Hoskins and Hawkey*, 1 A.R. 379, as having determined that the somewhat similar clause in the Insolvent Act permitted a recovery for more than one year's rent, if it became due within the year. That case, however, on a careful perusal, will be found not to be an authority that more than one year's rent can be claimed as a preferential lien, but rather the reverse; because it is clear that what was claimed was not a preferential lien for two years' rent, but for one—with a right to prove against the insolvent estate for the other; and it was the latter only which was disallowed.

Osler, J.A., in *Langley v. Meir*, 25 A.R. 372, at p. 381, again refers to the *Hoskins* case, but this time in terms more nearly agreeing with the view which I have endeavoured to express, namely, that the *Hoskins* case is not an authority for the proposition that more than one year's rent can, under any circumstances, be claimed as a preferential lien.

In *Langley v. Meir*, the question chiefly discussed is one with which we are not in this case concerned, namely, the meaning and scope of the three months' period after the assignment during or for which the landlord is given a preferential lien. The rent there in question was rent which fell due, if at all, only within that period of three months, and that only by virtue of the acceleration clause.

In the *Hoskins* case it was held that an accelerating clause, not unlike the one now in question, was fraudulent and void against creditors. And an argument to that effect was addressed to us here by the learned counsel for the respondent. The same argument, however, would have been an effectual answer in the subsequent cases in the Court of Appeal of *Linton v. Imperial Hotel Co.* and *Langley v. Meir*, to which I have referred, in both of which the *Hoskins* case was cited, but evidently not followed,

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nor even mentioned in the judgments upon the point in support of which it is now cited.

In *Baker v. Atkinson*, 11 O.R. 735, the *Hoskins* case was apparently neither cited nor referred to in the Divisional Court, although Armour, J., expressed an opinion in apparent agreement with that of Patterson, J.A., in the *Hoskins* case. Wilson, C.J., however, declined to express any opinion upon the point, and the judgment itself was afterwards reversed in the Court of Appeal (see (1887) 14 A.R. 409), again without a single reference to the *Hoskins* case. Under these circumstances, it seems to me that I am not bound to follow *In re Hoskins and Hawkey*, in so far as it can be deduced from it that an acceleration clause such as the one now before us is *ipso facto* void as against creditors. That is, in my opinion erroneously, to treat that which is properly a presumption of fact as a presumption of law. And, on the other hand, if it is to be regarded as a presumption of fact, the presumption fails because there is no evidence before us as to the financial condition of the lessee when the lease was executed. For all we know he may have been perfectly solvent then, or he may have since discharged all his then obligations.

The real difficulty in the way of an easy construction of the statutory provision arises, it seems to me, largely from placing too much stress upon the word "during," as if the right of distress existed in respect of any and all rent which was due and owing "during" the year next preceding the assignment. But for the statute, the landlord might distrain for up to six years' arrears. The right to distrain is not taken away; but the lien, as it is called, is, in my opinion, reduced to one year's rent if so much or more is owing, that is, that not more than one year's arrears prior to the assignment, whether actual, or accelerated as in this case, can now be claimed.

It is, I think, quite clear that if two or more years were actually due and in arrear "during" the year next preceding the assignment, for only one of them would the lien exist, and yet both would have been due "during" the year. In other words, "during" in my opinion has here very much the meaning of "for." If the section read, "the preferential lien of the landlord for rent shall be restricted to the arrears of rent due *for* the period of one year next preceding," etc., there could not be much doubt about

its meaning. And such a reading is, in my opinion, not only permissible—see Murray's English Dictionary "For," vol. 4, p. 412, X.—but correctly interprets what, looking at the course of legislation and at all the circumstances, is the manifest intention of the Legislature.

It would have been a wise precaution to have had the owners of the chattel mortgage before the Court as parties. The assignee may find that he has really been fighting a battle for their benefit rather than for that of the creditors whom he represents.

In the meantime, I think, the money realised from the sale, less the expenses of the sale, should be paid into Court to abide the further order of the Court.

With this variation, I would dismiss the appeal and cross-appeal, both with costs.

MACLAREN, J.A., agreed with GARROW, J.A.

HODGINS, J.A.:—The rent for the years 1915 and 1916 became due by virtue of the acceleration clause on the giving of the chattel mortgage in May, 1915. The assignment was made on the 7th September, 1915, so that the rent for which the preferential lien is asserted covers nearly a year and four months thereafter.

I see no escape from the conclusion that the rent for 1915 and 1916 was in arrear "during the period of one year next preceding . . . the assignment;" but the question is, can the landlord claim priority for it all, if it extends beyond three months after the assignment or beyond the time that the assignee retains possession?

There are expressions in the cases referred to by my learned brothers which would require the words in sec. 38 (1) "during the period of one year next preceding, and for three months following, the execution of the assignment," to be treated as indicating a continuous period of fifteen months during which rent may become in arrear, and for which therefore the landlord might distrain.

I prefer what I think is the view of the majority of the Court in *Langley v. Meir*, 25 A.R. 372, namely, that the section in question is intended to prevent priority for accelerated rent beyond three months from the execution of the assignment.

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The section is intended to restrict and not to enlarge or accumulate rights of distress.

The interpolation by 58 Vict. ch. 26, sec. 3 (1), of the words "for three months following" must have been intended to terminate the period for which a preference can be claimed where the assignee does not by remaining in possession extend it. The language is not happily chosen, but it is capable of this construction without doing much violence to grammar.

In *Langley v. Meir*, Burton, C.J.O., at p. 377, speaking of 58 Vict. ch. 26, says that is an Act "by which the preferential lien is again restricted as far as the amount payable under an acceleration clause in case of an assignment is concerned, and there is the prohibition of an agreement to accelerate the rent becoming due for a longer period than three months." And again: "Very few leases in modern times are without an express agreement that in the event of insolvency the rent shall be accelerated for a longer or shorter period, and the Legislature has now interfered by limiting the period to three months."

MacLennan, J.A., at p. 386, says: "If by the terms of the lease, three months or more of the future rent was payable in advance, or was accelerated by the execution of the assignment, then the defendant would have had a preferential lien for future rent to the extent of three months, but no more, because she could have distrained for it."

Osler, J.A., took a different view, considering that the landlord was entitled to rent becoming due during the three months. But, as I read his judgment, he did not intend to hold that, if the rent which became due during the previous year extended beyond the three months, the landlord could yet claim a preferential lien for it; because, in dealing with what rent is covered by the earlier words of the section, he describes it (p. 382) as "rent then" (i.e., during the year) "in arrear and capable of being distrained for, though not necessarily covering the whole period up to that time" (i.e., the execution of the assignment), "and in ninety-nine cases out of a hundred not doing so," and then he adds, as his comment on the three months' proviso: "Thus the gale of rent accruing, but not yet due at the date of the assignment, would be recoverable if it became due and in arrear within three months thereafter, as well as any other gale which might become due and in arrear within that time."

The majority of the Court considered that the right to this three months' rent was contingent upon the assignee remaining in possession for that time; a point which it is unnecessary to consider in this case, in view of the circumstances, as the distress here was made while the assignee was in possession, and for the rent which by the acceleration clause became due before the assignment.

The decision in *Langley v. Meir* is, I presume, a decision of the Court of Appeal, although pronounced by a majority in a Court consisting of only three of its members. But, if not, it assists the view which I have ventured to express.

I do not see how the acceleration clause can be considered as a fraud on the Assignments and Preferences Act.

In the case of *In re Murphy* (1803), 1 Sch. & Lef. 44, the clause was held to be fraudulent because the right to the accelerated rent did not exist before insolvency, and the contingency on which it became payable was the insolvency itself.

In *Ex p. Mackay*, L.R. 8 Ch. 643, Mellish, L.J., says (p. 648): "A person cannot make it part of his contract that, in the event of bankruptcy, he is to get some additional advantage which prevents the property being distributed under the bankruptcy laws."

Here the rent became accelerated not by the making of the assignment but the giving of a chattel mortgage, and the stipulated advantage is only that which is preserved to the landlord by the Assignments and Preferences Act, as now construed.

If that Act recognises and limits the preferential lien or right of distress, a provision in a lease which is a fraud upon that Act must, it seems to me, be one which attempts to override its provisions, and not one to which the Act applies, and in applying cuts it down to that which by the Act is considered reasonable.

On the facts of this case, and on the assumption that the assignee gave up possession, as I understand is the case, the landlord should be held entitled to a preferential lien for so much of the accelerated rent as does not extend beyond three months after the date of the assignment. This would give him the rent from the 1st January, 1915, to the 9th September, 1915, and for three months thereafter, or exactly eleven months and nine days. As this is very nearly the amount to which my brother Garrow

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thinks the landlord is entitled, and covers practically the same period, I would agree in the dismissal of the appeal. The money should be paid into Court as suggested.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 15th October, 1915, which was directed to be entered by Britton, J., on a motion for an injunction which was turned into a motion for judgment, and there is a cross-appeal of the plaintiff from the same judgment.

The respondent is the assignee for the benefit of creditors of James Lawrence Goodbrand, and the assignment is dated the 7th September, 1915.

Goodbrand was tenant of the appellant of a farm in the township of Nelson, in the county of Halton. The lease bears date the 16th January, 1915, and is made under the provisions of the Short Forms of Leases Act. The term is five years from the 1st January, 1914. The rent for the first year is \$500, payable one half on the 1st October, 1914, and the other half on the 31st December of the same year. The rent for the other two years is \$600 per annum, payable one half on the 1st October and the other half on the 31st December in each of the years (1915 and 1916), and the rent for 1914 was paid.

On the 11th January, 1915, the tenant made a chattel mortgage to Eber Ericsson Thornton for \$600, on all his goods and chattels, which were then or might thereafter be upon the farm, and on the 1st May, 1915, the tenant made another chattel mortgage on the same goods and chattels to George H. Horning for \$1,737.80, and these mortgages are still subsisting, though it is said that the first mortgage was paid off by Horning, and the amount of it is included in his mortgage.

On the 9th September, 1915, the appellant distrained the goods and chattels on the farm for \$1,200 which he claimed to be due and in arrear, being the rent for the years 1915 and 1916.

The claim that this rent was due and in arrear is based upon a provision of the lease which reads as follows: "Provided also, and it is hereby further expressly agreed and understood by and between the parties hereto, that if the term hereby granted, or any of the goods and chattels of the said lessee, shall be at any time during the said term seized or taken in execution or attach-

ment by any creditor of the said lessee, or if any writ of summons for a money claim or any execution or attachment shall issue out of any Court of law against the said lessee or goods and chattels, or if the said lessee shall make any chattel mortgage or bill of sale of any crops or other goods and chattels, or any assignment for the benefit of creditors, or if such crops, goods or chattels, shall or may be at any time liable to seizure by any chattel mortgagee thereof, or if said lessee becoming bankrupt or insolvent shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or so act that the occupation of said premises is or would be no longer a personal occupation by said lessee, shall attempt to abandon said premises, or to sell or dispose of farm stock or implements, by public auction or private sale or in any other manner, or to remove the same from the demised premises, so that there would not, in the event of such sale, removal, or disposal being completed, be a sufficient distress on said premises for the rent then due or accruing due, then and in every such case the then current as well as the next ensuing year's rent and taxes for the then current year (to be reckoned upon the rate of the previous year in case the rate shall not have been fixed for the then current year) shall immediately become due and payable, and the term hereby granted shall, at the option of the said lessor, immediately become forfeited and void, and in every of the above mentioned cases such accelerated rent and taxes shall be recoverable by the said lessor in the same manner as the rent hereby reserved, and as if the same were rent in arrear."

It does not appear that the appellant elected to forfeit the term, but apparently the contrary is the fact.

By sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, it is provided that: "In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises."

The parties appear to have misapprehended the effect of this provision, and to have been under the erroneous impression that it prevents a landlord from distraining upon the property of the tenant which has passed to the assignee by the assignment, and

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that the right of the landlord is to prove as a preferential creditor for the arrears of rent due to him, and the judgment is based upon the same view as to the effect of the sub-section.

The sub-section does not interfere with the common law right of the landlord to distrain, but only limits the extent of the arrears for which he may distrain: *Linton v. Imperial Hotel Co.*, 16 A.R. 337.

Unless the provision for the acceleration of the rent is open to the objection with which I shall afterwards deal, the effect of it is that, upon the happening of any of the events mentioned in it, the rent for the current year and the year following became due and payable, and the appellant was entitled to distrain for the two years' rent, just as he would have been entitled to distrain if by the terms of the lease the rent for those years had been made payable in advance on the day on which the event happened.

The effect of sec. 38 (1) is, that he may distrain only for the arrears of rent due "during the period of one year next preceding . . . the execution of the assignment;" and if, upon the happening of any of the events mentioned in the accelerating clause, the rent for the two years became payable, it was arrears of rent due during the period of one year next preceding the execution of the assignment.

The learned Judge treated the sub-section as limiting the amount for which distress might be made to rent for one year which became due during the year preceding the execution of the assignment; but that, in my opinion, is not its meaning. If it had been intended so to restrict the landlord's right, the provision would have been like that of sec. 55, which forbids the taking under execution of goods or chattels upon leased land unless before the removal of them from the land the landlord is paid "all money due for rent of the premises at the time of the taking of such goods or chattels by virtue of such execution if the arrears of rent do not amount to more than one year's rent," or, if the arrears exceed one year's rent, "one year's rent."

It is clear, I think—and that, as I understand, is my brother Garrow's view—that, had the assignment not been made, the appellant would have been entitled to distrain for the unpaid rent for the year 1915 and the rent for the year 1916, for, by the terms of the lease, when the chattel mortgage was made that rent became immediately due and payable.

The appellant had the right to distrain for it, because it was rent in arrear, and it became rent in arrear in, and therefore "during," the year next preceding the execution of the assignment. I am unable to understand how it was, for the purposes of sec. 38 (1), any the less rent in arrear during one year next preceding the execution of the assignment because an assignment had been made.

Where it is intended to restrict the landlord's right to distrain as my brother Garrow thinks it is restricted by sec. 38, very different language is used. In addition to what I have said as to sec. 55, it may be pointed out that the section of the English Bankruptcy Act which corresponds with sec. 38 preserves the right of the landlord to distrain "with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication"—46 & 47 Vict. ch. 52, sec. 42 (1)—language very different from that of sec. 38.

The case which the draftsman of sec. 38 had in mind was, I think, that of a landlord who had allowed several years' rent to fall into arrear, and the purpose was to restrict the common law right which the landlord has to distrain for six years' arrears—and the case of future rent the payment of which is accelerated was not present to his mind.

However that may be, I cannot construe the section as meaning that the landlord's right is restricted to the recovery of rent for "not more than one year's arrears prior to the assignment, whether actual or accelerated," as my brother Garrow thinks it is.

I am of opinion that the acceleration clause is void, at all events as against the respondent, as a fraud upon the Assignments and Preferences Act. That Act (R.S.O. 1914, ch. 134), though not an insolvent or bankruptcy Act, is "an Act respecting Assignments and Preferences by Insolvent Persons," and its purpose is to provide, in case of an assignment for the general benefit of creditors, for an equal distribution of the property of the assignor among his creditors without preference or priority.

With such an Act upon the statute-book, in my opinion, the acceleration clause in question cannot be treated as anything but a device to defeat the objects of it. The clause not only provides for accelerating the payments of the rent, but gives the

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respondent the right, if he chooses to do so, also to forfeit the term. If such a clause is valid against an assignee, I know of no reason why, if the term had been ten years, the provision might not have been that the rent of the whole term should become payable upon the making of the assignment, although no rent had yet become otherwise payable, and the first year of the term had not elapsed.

If the same rule is to be applied, as I think it should be, as is applied where the assignment is made under the provisions of an insolvency or bankruptcy Act, the case of *In re Hoskins and Hawkey*, 1 A.R. 379, is conclusive against the respondent, and there is also in favour of the view I take the opinion of a former Chief Justice of the Court of Appeal, then Armour, J., in *Baker v. Atkinson*, 11 O.R. 735, 752, though Wilson, C.J., doubted the correctness of it, and said he gave "no opinion on that part of the case."

The principle of the decision in the two cases which were followed in the *Hoskins* case—*In re Murphy* (1803), 1 Sch. & Lef. 44, and *Ex p. Mackay*, L.R. 8 Ch. 643—is, that "a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy than that which the law provides:" *per* James, L.J. (p. 647); and that the stipulation, being made with the express object of taking the case out of reach of the bankruptcy laws, is a direct fraud upon those laws. And, as put by Mellish, L.J. (p. 648): "A person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws."

That principle is, in my opinion, equally applicable where the event is the making of an assignment for the general benefit of creditors, for the object is to get some additional advantage which prevents the property being distributed under the Assignments and Preferences Act. The fact that in the case at bar the making of an assignment for the benefit of creditors was not the only event upon the happening of which the payment of the rent was to be accelerated, and that it was upon the occurrence of one of the other events provided for, and not by reason of the assignment, that the payment of the rent was accelerated, is, in my opinion, immaterial. There is but one proviso, and, if it is void by reason of the provision for the acceleration in the event of an

assignment being made, it is, in my opinion, vitiated *in toto*, and the whole proviso is void.

I have not found any case in which this point was decided. It was taken by counsel for the trustee in *Ex p. Barter* (1884), 26 Ch.D. 510, 516, but was not passed upon by the Court.

I would, for these reasons, dismiss the defendant's appeal and allow the appeal of the plaintiff with costs, and substitute for the judgment in appeal a judgment declaring that the acceleration clause is void as against the plaintiff, and restraining the defendant from proceeding further with the distress. The costs throughout should be paid by the defendant.

MAGEE, J.A.:—This case is, I think, to be governed in this Court by the decision in *Linton v. Imperial Hotel Co.*, 16 A.R. 337. There the acceleration clause made the current year's rent immediately payable and the term forfeited and void in case of the lessee making an assignment for creditors, and the landlord on the 24th July, 1888, distrained for \$270, balance of the current year's rent up to the 1st February, 1888, which had originally been payable \$85 on the 1st May, 1888, \$92.50 on the 1st August, and \$92.50 on the 1st November, 1888. The assignment had been made on the 16th July, 1888—and on the 1st September, 1888, the assignee had given up possession to the landlord. The parties submitted a special case asking whether and for what amount the landlord was entitled to distrain, and, if entitled to distrain for \$270, the landlord was to have judgment—but, if he was not so entitled to distrain, the assignee should have judgment for the difference up to \$185. The Judge of the County Court held that the landlord was entitled to distrain for \$270, but was liable to refund \$154.17 for the period between the 1st September, 1888, and the 1st February, 1889. On appeal it was held that as to this refund he had gone outside the special case; but that he was right as to the legality of the distress for \$270. It was argued for the assignee that only \$85 was in arrear; that the goods were *in custodiâ legis*; that by distraining the landlord elected to declare the term forfeited; that the distress was made outside the term; and that the acceleration clause was void as an evasion of the Bills of Sale and Chattel Mortgage Act, and also as being a fraud upon creditors. But these objections were all overruled. The

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result, therefore, was, that the landlord was held entitled to distrain for rent covering more than seven months after the assignment, including \$92.50 which would only have been payable more than three months after it.

In the present case, the landlord claims rent for nearly sixteen months after the assignment, including \$900 which would not have been payable within three months.

In the *Linton* case, however, clear effect was given to the clause accelerating the time for payment of the rent and making it as much in arrear for purposes of distress after the assignment as if it had been made originally payable on the 16th July, 1888. So here, under the express terms of the acceleration clause, the defendant was entitled, at any time after the chattel mortgage, to have distrained, as clearly as if the whole \$1,200 had been made originally payable on the 1st May, 1915. As in the *Linton* case, he did not distrain till after the assignment, though he says without knowledge of it, and the distress was upon goods of which the assignee had taken possession.

It was declared in that case that the Apportionment Act had no application; and, the Court having once concluded that the acceleration clause was valid and took effect, it is manifest that, on the limited terms of the special case, that Act could not apply.

It is said that the landlord's claim is a fraud upon creditors. In this particular case—leaving out of sight the fact of the mortgagee's claim—the landlord lost the season of 1915, and the benefit, worth \$500, of certain acreages of crop and ploughing and certain produce and poultry which the tenant covenanted to leave, and which would have replaced their equivalents received by the tenant when he was let into possession of the farm—and he would have to take his chances of obtaining a new tenant for 1916 at the like rent, even if he did not, by distraining after the assignment, deprive himself of the right to dispossess the assignee. But, in addition, the assignee became personally liable for the rent not payable before the assignment which would become payable while he continued to hold the term. His affidavit states that, in pursuance of the assignment, he took possession of the farm. He therefore was like any ordinary assignee of a term: *Linton v. Imperial Hotel Co.*, *supra*; *Magee v. Rankin* (1869), 29

U.C.R. 257; Lewin on Trusts, 12th ed., p. 265. He might be entitled to indemnity out of the trust estate if not negligent, but that would be as much at the expense of the creditors as the landlord's distress. It may be doubted whether the landlord gained much, even if entitled to hold the \$1,200. It is open to question whether the Legislature has not acknowledged the validity of a distress which does not go beyond the assignee's possession.

But we have not here to do with the validity of an acceleration by reason of an assignment for creditors. The landlord in effect says he has nothing to do with that. He does not claim land or rent on that account. He claims the rent as overdue by reason of the chattel mortgage, just as effectually as if it had been by the lease made payable on the 1st May, 1915. It is not suggested that acceleration by the mortgage would by itself be invalid or ineffectual.

It is true that the acceleration by the mortgage is contained in the same clause as the acceleration by the assignment; but, in my opinion, they are severable quite as readily as the covenants in *Mallan v. May* (1843), 11 M. & W. 653, and *Green v. Price* (1845), 13 M. & W. 695, against doing business in London or places outside. The clause provides that "in every such case" the acceleration shall ensue, and I see no reason for holding that such acceleration taking effect on the 1st May could be in any way affected by the rights of creditors or an assignee for creditors looming up four months later.

If the principle of *McFadden v. Brandon* (1904), 8 O.L.R. 610, be applied, it would seem that it would take effect even against the landlord's will, and that he could not have sued the assignee for the instalments due on the 1st October and the 31st December, 1915, because they did not become payable after the assignment—nor can the acceleration be looked on in the light of a penalty.

I see no ground, therefore, for holding that the distress for \$1,200 was not justifiable. Then comes the question, can the landlord hold the money, having once obtained it? And here we have to deal with sec. 38 of the Landlord and Tenant Act, and, as I venture to think, the Apportionment Act. Section 38, in sub-sec. 1, restricts—and therefore recognises—the "preferential lien of the landlord for rent" to certain "arrears," and therefore rent which has become payable. But what arrears?

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Those "of rent due during the period of one year next preceding, and for three months following, the execution of the assignment, and from thence so long as the assignee retains possession of the premises." By sub-sec. 2, notwithstanding any stipulation in any lease, the assignee may, within one month, by notice in writing to the landlord, elect to retain the premises occupied by the assignor for the unexpired term or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent. Whatever may be the effect of this sub-sec. 2 as entitling an assignee to shorten, and not merely to lengthen, his right of occupation, no such notice was given in this case, and there is no intimation that the assignee does not intend to "retain possession" for the whole term. If he does so, then sub-sec. 1 of sec. 38 does not deprive the landlord of his "preferential lien" for the whole term. But how or when is he to enforce it, if not when the rent is payable? The rent being all payable, he must distrain for all at the one time if there are goods enough, or not at all. He cannot split up his demand and distrain a second time upon the assignee or any one else in possession: Woodfall's Landlord and Tenant, 19th ed., p. 580. As this rent, \$1,200, became payable on the 1st May, 1915, the landlord could not say: "I will only distrain for the proportion for one year or one year and three months afterwards, and afterwards, if the assignee holds possession, I will distrain for more, either all at once or from time to time." Then, if he was entitled to distrain for \$1,200, and if he could not safely distrain for less, and if nothing has happened to shew that he will not be entitled to the full amount, on what principle can any part of the money in Court be taken from him? I fail to see any.

It may be necessary in some future case to decide whether an assignee may not become entitled to repayment of part of rent so distrained for. Section 38 began in Ontario legislation in 1887, by 50 Vict. ch. 23, sec. 2, which was amended in 1895 by 58 Vict. ch. 26, sec. 3, and in 1911 by 1 Geo. V. ch. 37, sec. 38. The Act of 1887 followed the wording of the Insolvent Acts, which began in 1865, 29 Vict. ch. 18, sec. 14—whereby the "preferential lien" was restricted to the arrears of rent due during the period of one year last previous to the assignment and so long as the assignee should retain possession.

Although expressly limited to Upper Canada, the phraseology was doubtless to be credited to a Lower Canadian source, as suggested by Patterson, J.A., in *In re Hoskins and Hawkey*, 1 A.R. 379. But, though the same words were used, I agree with Street, J., in *Lazier v. Henderson*, 29 O.R. 673, that they are not necessarily to be given the same interpretation. In *In re West Lorne Scrutiny* (1913), 47 S.C.R. 451, the interpretation of the word "scrutiny" in an Ontario Act differed from that put upon it in a Dominion Act in *Chapman v. Rand* (1885), 11 S.C.R. 312; and see *In re Saltfleet Local Option By-law* (1908), 16 O.L.R. 293, at p. 309. There is here the very important fact that between 1865 and 1887 a radical change had been made in the character of rent itself, by declaring that "all rents . . . shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."* Previously rent could in no sense be considered due until it was payable and (except as to cases of apportionment on death under 11 Geo. II. ch. 19, sec. 15, and later statutes) there was never an apportionment in respect of part of the time: *Clun's Case* (1913), 10 Rep. 127 (b). The effect of the corresponding English Apportionment Act (33 & 34 Vict. ch. 35) was considered in *Re Lucas* (1885), 54 L.T.R. 30, by Fry, L.J., who held that rent accrued but not payable was included in a bequest of rent due. Lord Esher and Bowen, L.J., owing to other expressions in the will, held the contrary, but expressed no opinion as to the Act, though the latter was not inclined to agree with Fry, L.J. In *In re Howell*, [1895] 1 Q.B. 844, the apportionment was held to be accrued due. The word "due" has more than one signification, and may mean a debt existing though not yet payable: see Bouvier's Law Dictionary, ed. of 1897, and Black's Law Dictionary, ed. of 1891. I am inclined to think that the Ontario Legislature used the word "due" in the sense of the Apportionment Act, and I suspect that it was carelessly so used in the Insolvent Act of 1865 without consideration of the fact that in Upper Canada rent was not apportionable. If the word "due" is read as "accrued," difficulties which necessarily arose in the construction of the enactment would, I think, largely disappear, and the evils of rent in arrear and rent in advance, against which the Legislature may be sup-

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*See the Apportionment Act, R.S.O. 1914, ch. 156, sec. 4.

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posed to have wished to guard, would be prevented. Under the statute of 8 Anne ch. 14, sec. 1, the execution creditor need only pay one year's rent if more were in arrear, or less if less. Under the English Bankruptcy Acts the distress only avails for six months—formerly one year's rent accrued due, and, as the period counts from the act of bankruptcy, and not from the actual proceedings, the landlord, after distraining for more, may have to repay part to the trustee. Such are precedents in policy which the Legislature may be assumed to have had in mind. But I can see no ground here for basing a claim for a return of any of the money.

It does not appear how much is owing to the mortgagee, but probably much more than the amount in Court, and it is probable that the assignee has no real beneficial interest in the goods. The statute for the creditors' benefit should not be extended in favour of the mortgagee: see *Railton v. Wood*, 15 App. Cas. 363.

I would give judgment for the landlord for the moneys in Court to the extent of \$1,200—and his expenses and costs of the action and appeal.

Judgment below affirmed, with a variation.

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Crown Lands—Purchase from Department—Assignment of Locatee's Rights for Value—Bona Fides—Delay in Performance of Settlement Duties and in Registration of Assignment—Sale of Locatee's Interest under Execution—Sheriff's Deed—Contest between Assignee and Purchaser—Dates of Recording Instruments in Department—Priorities—Public Lands Act, R.S.O. 1897, ch. 28, secs. 19, 31, 37; 3 & 4 Geo. V. ch. 6, secs. 16, 44 (1).

In 1881, the father of the plaintiff bought from the Crown Lands Department two quarter sections of unpatented land in the District of Algoma, paid therefor, and became entitled to ask for a patent on performance of settlement duties. In 1906 and 1907, the lots being still unpatented, the plaintiff made money advances to her father, in consideration of which he, on the 17th July, 1907, executed a quit-claim deed of the lots in her favour. On the 5th September, 1907, a creditor of the father recovered a judgment against him for the payment of money; on the 20th September, an execution issued upon this judgment against the lands of the father was placed in the hands of the Sheriff of Algoma; and, on the 21st September, a certified copy of the execution was forwarded to the Department, where it was recorded on the 23rd September, 1907. The execution was kept alive by renewals. The plaintiff's deed was not sent to the Department until February, 1914, and was recorded there as an assignment of her father's rights to the plaintiff, on the 11th of that month. On the 10th July, 1914, the sheriff, under the execution, sold and on the following day conveyed to the defendant the interest of the plaintiff's father in the lots; the sheriff's deed was shortly

afterwards lodged with the Department; and in November, 1914, this action, to set aside the sheriff's deed and for other relief, was begun:—

Held, upon the evidence, that the sale to the plaintiff by her father was a *bonâ fide* sale and for value; that there was no intention on the part of the plaintiff to defeat, hinder, or delay her father's creditors; and, although the plaintiff had been guilty of laches in regard to the performance of the settlement duties and in notifying the Department of the assignment to her, yet, as the Crown had not chosen to cancel the rights of the father, and had recognised the assignment, the plaintiff was entitled to a declaration that the defendant took no interest under the sheriff's deed, and that the lots were the property of the plaintiff, subject to the rights of the Crown in regard to the performance of settlement duties.

Sections 19, 31, and 37 of the Public Lands Act, R.S.O. 1897, ch. 28, and secs. 16 and 44 (1) of the Public Lands Act, 3 & 4 Geo. V. ch. 6, considered.

ACTION for a declaration of the rights of the plaintiff as assignee of the locatee of unpatented Crown lands, and to set aside an alleged conveyance to the defendant by a sheriff of an interest in the lands, and for an injunction restraining the defendant from cutting timber, and for other relief.

The action was tried by SUTHERLAND, J., without a jury, at Toronto.

Gideon Grant, for the plaintiff.

Grayson Smith, for the defendant.

February 8. SUTHERLAND, J.:—In the year 1881, Charles Hamilton, the father of the plaintiff, bought from the Crown Lands Department of the Province of Ontario, the south-west quarter of section number 22, and the north-west quarter of section 15, in the township of Rose, in the district of Algoma, duly paid therefor, and became entitled to ask for a patent, on performance of settlement duties.

In the month of July, 1907, the plaintiff, who is his daughter, was living with him at Bruce Mines. Hamilton had previously been engaged in business elsewhere, and had incurred debts which he was unable to pay. The plaintiff, who is a school teacher, had been advancing sums of money to assist him.

In December, 1906, she advanced to him the sum of \$175, and in July, 1907, a further sum of \$40. Her evidence is that an agreement was made between her father and herself, that, in consideration of \$200 of the moneys thus advanced, he should convey to her his interest in the property in question. This agreement was carried into effect by the execution by him on the 17th July, 1907, of a quit-claim deed of the property in her favour.

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The plaintiff attempted to register the deed in the office of the Local Master of Titles for Algoma, and sent it to him for that purpose, but on the 31st July, 1907, it was returned with the information that the properties therein mentioned could not be registered under the Land Titles Act. There was thus apparently a prompt and *bonâ fide* attempt to put it on record.

Among other debts owing by the father was one in favour of the Percival Plow and Stove Company, on which it obtained, on the 5th day of September, 1907, a judgment against him in the 5th Division Court in the County of Leeds and Grenville. On the 7th, a transcript of the judgment was issued to the Second Division Court in the District of Algoma, and, on the 9th, an execution was issued against the goods of Charles Hamilton, which on the 16th was returned *nulla bona*. On the 20th, an execution against the lands of Charles Hamilton was issued and filed in the office of the Sheriff for the District of Algoma, and a certified copy thereof was, on the 21st, forwarded to the Deputy Minister of Lands and Forests at the Parliament Buildings, Toronto, where it was received and noted on the 23rd September, 1907.

In reply to a letter written by the plaintiff's solicitor to the Department, the Deputy Minister on the 8th October, 1907, wrote as follows: "I return the enclosed writ of execution against lands in the suit of The Percival Plow and Stove Company v. Charles Hamilton, which you should send to the sheriff to whom it is addressed. I have made a note of it against N.W. $\frac{1}{4}$ section 15 and S.W. $\frac{1}{4}$ section 22, Rose, which stand in the name of Charles Hamilton, paid in full, but unpatented, because proof of performance of settlement duties has not been filed."

On the 28th October, the solicitor again wrote to the Deputy Minister as follows: "Am I to understand that our execution against Charles Hamilton is registered against the lands of Hamilton, or should I send you a copy of the execution in order to have it recorded against the lands, N.W. $\frac{1}{4}$ sec. 15 and S.W. $\frac{1}{4}$ sec. 22, Rose?" A reply was sent on the 6th November, 1907, as follows: "In reply to your letter of the 28th ulto., I have to say that your execution against the lands of Charles Hamilton is noted against N.W. $\frac{1}{4}$ section 15 and S.W. $\frac{1}{4}$ section 22, Rose."

The execution against the lands was renewed in September,

1910, and September, 1913. The defendant herein had apparently begun to inquire about the lands in question towards the end of the year 1913. The judgment obtained by the company had been assigned to one T. H. Percival.

On the 2nd February, 1914, the defendant's solicitor wrote a letter, directed to Charles Hamilton at 12 Westminster avenue, Toronto, where he and his family were apparently then residing, from which I quote in part as follows: "Some time ago, Mr. T. H. Percival, of Ottawa, obtained a judgment against you for \$96.26, and the judgment and costs now amount to over \$100. Mr. Percival filed an execution in the sheriff's office, and also in the Department of Lands Forests and Mines, against the two lots which you have in Rose township, and the execution has been in the sheriff's office for something over a year, and I am entitled by law to advertise the property under a sheriff's sale and sell same at once. I have a letter from the Deputy Minister to the effect that the patents will be turned over to the purchaser under the sheriff's sale. Now, it will only delay matters to put this property up at a sheriff's sale, and the costs of advertising will be something over \$25. Now, I am willing to pay you \$15 if you will execute assignments of these properties and will forward same to me. . . . By executing this assignment, you are getting \$15 in cash, and you are wiping off this old debt, which has been standing against you for a considerable number of years. I enclose assignments. . . . Of course, if you will not execute these assignments, why I shall proceed at once with the sheriff's sale, and you will lose the property in any event, and I consider it is to your advantage to make a little money by executing the assignment sooner than lose it altogether."

On the 6th February, the defendant's solicitor wrote to the Deputy Minister as follows: "Some time ago I filed with you an execution at the suit of T. H. Percival v. Charles Hamilton, in respect of an unpatented lot owned by Hamilton in Rose township. . . . Would you kindly inform me if the Department would permit me to have the lot sold by the sheriff so that the purchaser could take over Hamilton's interest in the lot?"

On the 9th February, the Deputy Minister replied as follows: "I have to say that, if the interest of Charles Hamilton in north-west quarter section 15 and south-west quarter section 22, Rose,

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is sold by the sheriff under execution, the purchaser will stand in Hamilton's place and will be required to perform the settlement duties in order to obtain patent."

I have little or no doubt that the letter of the 2nd February, written to Hamilton, was in due course received and shewn to the plaintiff, and resulted in her becoming active about her rights under the deed from her father. Up to this she has had not filed her assignment with the Department. On the 11th February, there is a letter from her solicitor, Mr. Lown, to one Murphy, an official in the Department of Crown Lands, referring to an interview which Lown or his clerk had had with Murphy on the previous Monday, and which goes on to say: "I find the reason no one was residing on the property and there was no lumber there when your Department's agent inspected the property, was the building which had been erected and the lumber there had been destroyed by a fire. My clients tell me they intend to erect fresh buildings, etc., as soon as weather permits. I find the judgment, etc., you mentioned is being dealt with, and there will be no sheriff's sale, and consequently no purchaser."

On the 12th February, Charles Hamilton wrote to the defendant's solicitor: "I have your favour of the 2nd inst. *re* lots in Rose township. I sold my claim on these lots some time ago to S. A. Hamilton, and same has been duly registered in Crown Lands office."

This letter apparently crossed one written by the defendant's solicitor to Hamilton on the 13th February, which in part is as follows: "I am forwarding cheque for \$25 to W. H. Carney, sheriff, to-day, and he has instructions to proceed with the sale of N.W. $\frac{1}{4}$ section 15 and S.W. $\frac{1}{4}$ section 22, Rose. Mr. Aubrey White, the Deputy Minister of Lands and Forests, advised me that a Mr. A. S. Lown had stated that the judgment would be paid, and for that reason I waited on you. However, you never had the courtesy to write me, and you will now have to settle with the sheriff or lose your lots entirely. The sheriff has my instructions to sell these lots at the earliest possible date."

On the 14th February, the solicitor again wrote to the Deputy Minister and referred to his offer to Hamilton to settle his claim without having a sheriff's sale, and his reply of the 12th February, and then goes on to say: "Kindly write me and let me know just

what date the assignment of Crown land respecting the above named two lots was filed with you and also the date that my execution was placed with you in the suit of Percival v. Hamilton. You can understand that, before proceeding with a sheriff's sale, I should like to get the dates of the filings of these two documents to make sure of my ground."

The Deputy Minister replied on the 17th as follows: "I have to say that the execution against Charles Hamilton was filed on 23rd September, 1907, and the assignment by Charles Hamilton to Sara Ann Hamilton is dated 17th July, 1907, but was not filed until 11th inst. Mr. A. S. Lown, who filed it, states that the judgment is being dealt with, and that there will be no sheriff's sale."

On the 16th March, the plaintiff wrote two letters, one to the Percival Plow and Stove Company, directed to Ottawa, and the other to the defendant's solicitor directed to Bruce Mines, referring to previous letters having been written to her father, and in the first letter she says: "I am anxious to pay father's debts and willing to do all I can. Keeping up his insurance was the best plan I could think of. I might manage to make small monthly payments except in August and September, if you would take it that way; or would sell the land and pay you if a buyer could be found, but will have nothing to do with Mr. Peterson." And in a P.S. she says: "I would be only too glad to sell it and have the money used for paying you and any others holding any claims against father."

In the letter to the solicitor she says, referring to the land: "It has been mine for several years, and I have writings and proof to vouch for the fact. I paid for the land, and, although anxious to pay father's debts, cannot see how it can be sold again without my consent, and of course will not let it go without trying to get my own out of it."

On the 14th May, the defendant's solicitor again wrote the Deputy Minister in part as follows: "However I may say Mr. Lown did not correspond with me, and I have proceeded with a sheriff's sale, and the property is now being advertised by the sheriff, and it is up for sale on the 30th day of June next."

On the 27th May, the Deputy Minister wrote to the said solicitor as follows: "I send you a copy of the assignment from

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Charles Hamilton to Sara Ann Hamilton. You will observe that the affidavit of execution was sworn on the 20th July, 1907, just two months before the date of the *fi. fa.* If the purchaser at sheriff's sale wishes to have a good title, this assignment must be removed."

The land being exposed to public sale on the 30th June, 1914, no bid was obtained, and the sale was postponed to the 10th July following, when, by virtue of a writ of *venditioni exponas* issued out of the Second Division Court in the District of Algoma, and tested the 6th July, 1914, the interest of Charles Hamilton in the lands was again exposed to public sale on the said 10th July, when the sum of \$30 was paid by N. H. Peterson for Albert Shaule, he being the highest bidder therefor.

On the 11th July, 1914, the sheriff executed a deed in favour of Shaule of the "estate, right, title, interest, claim and demand . . . which the said Charles Hamilton of right had at the time of the said delivery to him on the 17th October, 1907, of the said writ of execution, or at the time of said sale of the lands in question."

Notwithstanding his having obtained the sheriff's deed, the defendant—it is said, without the knowledge of his solicitor—wrote to Charles Hamilton on the 9th September, 1914, as follows: "I am taking the privilege of writing you in regards to property owned by you in Rose township. Now I want to know if you will part with same, and what would be your lowest offer on same. I understand you own the S.W. $\frac{1}{4}$ of section 22 and the N.W. $\frac{1}{4}$ of section 15. Kindly let me know if this is right, and let me know if you will sell and what your terms would be."

The sheriff's deed was apparently then sent to the Department; and on the 30th October, 1914, the Deputy Minister wrote to other solicitors, namely, Messrs. Williams & Clement, as follows: "In reply to your letter of 17th inst. with sheriff's deed of north-west quarter section 15 and south-west quarter section 22, Rose, to Albert Shaule, I have to say that these lands were sold in 1881 to Charles Hamilton, who paid for them in full. On 23rd September, 1907, a copy of an execution dated 20th September, 1907, against the lands of Hamilton, was received in the Department, under which the sheriff has sold to Albert Shaule. On 19th July, 1907, Charles Hamilton assigned both parcels to Sara Ann Hamil-

ton, but the assignment was not filed in the Department until February last, and previous to that date the Department had informed the plaintiff's solicitor that the purchaser at sheriff's sale would stand in the place of the defendant and would be entitled to ask for patent on performance of settlement duties. I am writing to the solicitor who filed the assignment to Miss Hamilton, that the Department recognises the title of Mr. Shaule, leaving it to him to take such action as he may see fit." This information seems to be at variance with the opinion expressed by the Deputy Minister in his letter of the 27th May, 1914, which of course had been written before the sheriff's sale had been consummated.

On the same day, he wrote to Mr. Lown as follows: "I have to inform you that a sheriff's deed has been filed, vesting in Albert Shaule the interest of Charles Hamilton in north-west quarter section 15 and south-west quarter section 22, Rose, and that the Department recognises the right of Mr. Shaule to perform the settlement duties and apply for patent."

On the 17th November, Lown wrote to the Deputy Minister in part as follows: "It was owing to their inexperience in dealing with such matters that the deed was not tendered to your Department for recording earlier than it was, which I think you will find from reference to your records was done by me on the 10th of November last, and my client formally objects to the patent being issued to Mr. Shaule, and will leave that party to take the steps he threatened long ago to set aside the deed, which, notwithstanding his knowledge of its existence, he has never done. My client has always been willing to perform all settlement duties, and tells me there is a good road already to the property, and a well constructed on it, and they would have resided there this summer but for the buildings having been burned."

Lown seems to have soon changed his mind, for, on the 19th November, the writ in the present action was issued; and the plaintiff, in her statement of claim, after setting out some of the facts already referred to, says that, after having obtained the deed in July, 1907, she "paid or caused to be paid all settlers' duties and taxes payable in respect of such lands, and performed all the duties incumbent upon settlers of which she had notice or knowledge, but could not reside on the said property last summer owing

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to the buildings thereon having been destroyed by fire. She constructed or caused to be constructed a road to such lands, and sunk a good well thereon. . . . 11. The defendant claims to be entitled to cut and remove the timber growing on the said lands, and has directed gangs of men to enter thereon for that purpose, and claims to be the owner thereof under and by virtue of the sheriff's deed alleged to have been executed in his favour in June last."

The defendant, in his statement of defence, refers to his having obtained the execution and filed it in the Department, and refers to some of the letters already quoted, and then pleads the sheriff's sale and purchase by him and the filing of his deed with the Deputy Minister and the obtaining of an acknowledgment thereof, and his willingness, as soon as this action shall have been determined, to perform the necessary duties; and by way of cross-relief he claims a declaration "that the conveyance given by the said Charles Hamilton to the plaintiff was fraudulent as against the creditors of the said Charles Hamilton;" "a declaration that the plaintiff, by reason of her non-entry upon the said lands and her non-performance of any settlement duties, has forfeited all right and claim to said lots;" and a declaration that, under his deed, he is entitled to be entered as locatee for the lots.

On the 25th November, Mr. Lown wrote to the Deputy Minister as follows: "Referring to my previous communication, I think it but right that you should know that Miss Hamilton has instituted an action in the Supreme Court against Mr. Shaule, asking, *inter alia*, for the sheriff's deed to be set aside as far as she is concerned, and for declaration that it conferred no property in the lands in question on the defendant, and she has obtained an interim injunction restraining him from entering upon the lands or cutting the timber thereon." This letter was acknowledged by the Deputy Minister on the 2nd December.

There can be no doubt that the plaintiff has been guilty of great delay, so far as regards performing settlement duties and putting herself thus in a position to apply for a patent, and also in recording the deed from her father to herself with the Department. She perhaps in the meantime has paid some taxes on the property. The Department, however, is apparently lenient about such matters, and no cancellation of the rights of Charles Hamilton

has ever been made, though no doubt a cancellation might have been. It certainly looks as though the plaintiff had well-nigh made up her mind to abandon the property, and was stirred into activity only when she found that some one else was anxious to get the lots. She had, however, under the deed, acquired such interests or rights as her father had obtained in the property. If he had any interest at the time of the sheriff's sale, that interest might have passed thereunder. But Charles Hamilton had sold his interest to the plaintiff, and at the time of the sale, and to the knowledge of the defendant and his solicitor, a deed was in existence purporting to have transferred any interest Charles Hamilton had to his daughter.

By the Public Lands Act, R.S.O. 1897, ch. 28, sec. 19, a provision was made for the registration, in a book to be kept by the Commissioner of Crown Lands for the Province, of the particulars of any assignment made by a purchaser or locatee of public lands, and the endorsement thereon of a certificate of registration; and, by sub-sec. (2) of the said section, an assignment so registered shall be valid against one previously executed and unregistered or one subsequently registered; but it was a further provision of sub-sec. (2) of the said section that all conditions of the sale, grant, or location, must have been complied with or dispensed with by the Commissioner before registration was made.

The plaintiff did not, of course, comply with this provision at any time, and did not attempt to file her deed until long after a note of the execution had been made in the Crown Lands Department. Section 31 of the Act is as follows: "Subject to the Land Titles Act, if a patent for land is repealed or avoided by the High Court, the judgment shall be registered in the registry office of the registry division in which the land lies."

By sec. 37, unpatented lands are liable to assessment in the municipalities in which they lie from the date of the sale to the licensee, and a purchaser at the sale of such lands for taxes shall have in the lands so sold "the same rights only as the person entitled to claim under the Crown at the time of such sale."

In *Yale v. Tollerton* (1867), 13 Gr. 302, it was held that the Court "will, at the instance of a judgment creditor of a locatee of the Crown, with execution against lands in the hands of the

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sheriff, direct the interest of the locatee to be sold and order him to join in the necessary conveyance to enable the purchaser under the decree to apply to the Crown Lands Department for a patent of the land as vendee or assignee of the locatee." However, this course was not taken by the execution creditor.

In *Ferguson v. Ferguson* (1869), 16 Gr. 309: "A debtor being a vendee of land and in default in paying the purchase-money, a creditor obtained execution against his lands, and at the sheriff's sale became the purchaser of the debtor's interest for a sum equal to the debt and costs, and took the sheriff's deed accordingly: *Held*, that he could not afterwards repudiate the purchase and claim his debt on the ground that the debtor's interest was not saleable by the sheriff. The interest of a debtor in land, bought from the Crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase-money, and procuring the patent to issue in the names of the heirs." In this case, Mowat, V.-C., said: "We think it clear that an interest of this kind in land can be reached by an execution creditor, through means of this Court; and that the heirs, or any one for them, cannot intercept the rights of creditors, by advancing what may be due to the Crown as vendor, any more than in the case of a private vendor."

Reference to *Bondy v. Fox* (1869), 29 U.C.R. 64; *Cornwall v. Gault* (1863), 23 U.C.R. 46; *Peebles v. Hyslop* (1914), 30 O.L.R. 511; *Ruttan v. Burk* (1904), 7 O.L.R. 56; *Howard v. Stewart* (1914), 50 S.C.R. 311.

In 1913, the Act 3 & 4 Geo. V. ch. 6, known as the Public Lands Act, was passed, and by sec. 59 it was thereby enacted that R.S.O. 1897, ch. 28, should be repealed. The Act was assented to on the 6th May, 1913. Section 16 is as follows: "If the Minister is satisfied that a purchaser, locatee or lessee of public lands, or any person claiming under or through him, has been guilty of fraud or imposition, or has violated any of the conditions of sale, location or lease, or of the license of occupation, or if the same was made or issued in error or by mistake, he may cancel such sale, location, lease or license, and resume the land and dispose of it as if the same had never been made."

And sec. 44, sub-sec. (1), provides that "neither the locatee nor any one claiming under him, shall have power, without the consent in writing of the Minister, to alienate, otherwise than by devise, or to mortgage or charge any land located as a free grant or any right or interest therein before the issue of the letters patent."

Here the conveyance to the plaintiff had been made long before the passing of this Act, though the fact had not been brought to the notice of the Department. No case has been cited to me, and I have been unable to find one expressly in point, to determine that in the circumstances in question the purchaser at the sale under the execution should take priority over the assignee under the deed. It has not been shewn that the plaintiff knew of the existence of the specific debt against her father on which the judgment was obtained and execution issued.

On the evidence I find as a fact that the sale to her by her father was a *bonâ fide* sale and for value. I do not think there was any intention on the part of the plaintiff to defeat, hinder, or delay creditors. I think, as the matter stands, the registration of the sheriff's deed in the Crown Lands Department, after due notice before the sale under which it was obtained, of the assignment of the interest of Hamilton to the plaintiff, is in effect a cloud upon the title of the plaintiff, and, while it stands, apparently prevents her from proceeding as she expresses her intention of doing to perform the settlement duties necessary to enable her to obtain the patent.

It is true she has been guilty of laches with respect to these duties; but the Crown has not seen fit to take advantage thereof, as it might have done, as there has been no cancellation of the rights of the purchaser or locatee which she acquired under her deed; and the Department, in their letter of the 27th May, then recognised the assignment as standing in the way of a good title to a proposed purchaser at a sheriff's sale.

The defendant himself, after the sheriff's sale, seemed to question his own title thereunder, and sought to purchase an interest he apparently still thought existing in Hamilton.

The plaintiff will, therefore, have a declaration that, as Charles Hamilton had parted with his interest in the lands in question to the plaintiff before the sheriff's deed to the defendant, the latter

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took no interest therein, and that the said lands are the property of the plaintiff, subject to the rights of the Crown with reference to the performance of settlement duties.

There will also be an injunction restraining the defendant, his agents or servants, from entering upon or cutting timber on the said lands. No damages were proved.

The plaintiff will have the costs of the action.

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HOWARTH V. ELECTRIC STEEL AND METALS CO. LIMITED.

YOUNG V. ELECTRIC STEEL AND METALS CO. LIMITED.

Negligence—Injury and Death by Explosion in Works of Steel Company—Electric Transformer—Supply of Electric Power—Hydro-Electric Power Commission of Ontario—Introduction of High Tension Wires—Explosion Caused by Failure to Make Proper Connections—Negligence of Foreman Employed by Commission—Absence of Contributory Negligence—Liability of Commission—Emanation from the Crown—Power Commission Act, 7 Edw. VII. ch. 19, sec. 23; R.S.O. 1914, ch. 39, sec. 16—Consent of Attorney-General to Commission being Added as Defendants—Implication—Power of Court to Give Judgment against Commission.

An employee of the defendant was killed and another employee was injured by an explosion in the transformer station of the defendant company. The administratrix of the estate of the deceased man brought an action against the defendant company under the Fatal Accidents Act to recover damages for his death; and the injured man sued for damages for his injuries. The Hydro-Electric Power Commission of Ontario were added as defendants in both actions, upon the consent of the Attorney-General, after the commencement of the actions. The transformer in the station was the property of the defendant company. By arrangement with the defendant company, the Commission built an extension line and installed the equipment necessary to supply power for the defendant company's works. The high tension construction work was done under the superintendence of an engineer employed by the Commission. The cause of the explosion was the making of a wrong connection in bringing the high tension wires into the transformer; the connections were made by a man employed by the Commission as construction foreman, in the course of the work of which he was in charge:—

Held, that the explosion occurred through the negligence of the employees of the defendant Commission, and that they were liable to both plaintiffs; and that there was no contributory negligence on the part of the deceased or the injured man.

Held, also, that, although the Commission were an emanation from or an agent of the Crown, and were not, by the Power Commission Act, 7 Edw. VII. ch. 19 (now R.S.O. 1914, ch. 39), created a corporation or body politic and corporate, yet, the consent of the Attorney-General to their being added as defendants, under sec. 23 of the original Act (sec. 16 of the present Act), having been given, judgment might be pronounced against them.

Graham v. Commissioners for Queen Victoria Niagara Falls Park (1896), 28 O.R. 1, and *Roper v. Public Works Commissioners*, [1915] 1 K.B. 45, distinguished.

THE first action was brought by Minnie Howarth, mother and administratrix of the estate of Ambrose Howarth, deceased,

against the above-named company and the Hydro-Electric Power Commission of Ontario, to recover damages for the death of her son, from injuries sustained in the transformer station of the employers of the deceased, the defendants the Electric Steel and Metals Company Limited, at the town of Welland, by the explosion of an oil-switch.

The second action was brought against the same defendants by one Young, also employed by the defendant company, who was injured by the same explosion.

The actions were tried together by SUTHERLAND, J., without a jury, at St. Catharines.

A. C. Kingstone, for the plaintiffs.

G. Lynch-Staunton, K.C., and *G. B. Burson*, for the defendants the Electric Steel and Metals Company Limited.

M. H. Ludwig, K.C., for the defendants the Hydro-Electric Power Commission of Ontario.

February 8. SUTHERLAND, J.:—These two cases were, by consent of counsel, tried together, the evidence in the main being applicable to both.

The actions arise out of an explosion, on the 17th October, 1914, of the oil-switch in the transformer station of the defendants the Electric Steel and Metals Company Limited at the town of Welland, as a result of which Ambrose Howarth, one of their employees, was so injured that he soon afterwards died, and the plaintiff Young, another employee, was also injured.

The Howarth action was commenced by writ dated the 14th January, 1915, the plaintiff being Minnie Howarth, the mother of the deceased man, Ambrose Howarth, and suing originally as his parent. At the trial, an application was made to amend so that she should sue as administratrix of the estate of her deceased son, instead of as parent, which application was granted.

The other action is brought by the injured man, Young.

In the Howarth action, the plaintiff says that the facts are "that the explosion was caused by the negligence, carelessness, and incompetence of the persons employed by the said defendants the Electric Steel and Metal Company Limited, in making the connection of high tension wires heavily charged with electric

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current to the furnace transformer on the said defendants' premises; and that the defendants the Hydro-Electric Power Commission of Ontario, their officers, agents, and workmen employed by the defendants the Electric Steel and Metals Company Limited, wrongfully and negligently connected the high tension wires in such an unskilful manner as to cause a very high and excessive current of electricity to flow into the said oil-switch, thereby causing the explosion above referred to. The plaintiff further says that in any event the electrical appliances at the said defendant company's transformer house were defective for the purposes for which they were used, and no proper inspection had been made of the said electrical appliances before the electric current which caused the explosion had been turned on; and that, had a careful, thorough, and proper inspection been made of the said appliances in use at the said plant at the time, the said current would not have been permitted to escape, and the said explosion would not have occurred."

The defendants the Electric Steel and Metals Company Limited, on their part, deny that the explosion was caused by any negligence, carelessness, or incompetence on their part, or that the electrical appliances owned by them were defective. They also say that the deceased man was not acting within the scope of his employment at the time he was injured, and was not in the transformer house at the time by reason of the order or directions of the company's superintendent or any other person in their service to whose orders the deceased was bound to and did conform. They also say that, if the electrical appliances owned and installed by the defendants the Hydro-Electric Power Commission of Ontario were defective, or if no proper inspection was made, it was the fault of their co-defendants, the Hydro-Electric Power Commission of Ontario, who, under their contract with the Welland Power Commission, were to supply and install all appliances, wiring, etc., up to the transformer on the high tension side, and provide such inspection as was necessary. They also deny that the Hydro-Electric Power Commission of Ontario were employed by them for the installation of the high tension wiring, oil-switches, etc., these appliances being the property of the Hydro-Electric Power Commission of Ontario, under a contract signed between them and the Welland Power Commission,

whereby they were owned and installed by that Commission—the defendants the Electric Steel and Metals Company Limited having an option to purchase them, should they desire to do so.

The defendants the Hydro-Electric Power Commission of Ontario deny that the explosion of the oil-switch was caused in consequence of their negligently connecting the high tension wires with it. They also deny that the electrical appliances at the transformer house were defective for the purposes for which they were intended to be used, or that proper inspection was not made thereof before the electric energy was turned into the oil-switch. They also plead that the injuries sustained by the deceased man were the result of his own negligence, and not of any negligence on their part, and that he was not acting within the scope of his employment when injured, and was not present in the station at the time of the explosion by their order or direction or that of any person in their service to whose orders he was bound to and did conform.

In the Young action, the plaintiff says that the defendants the Hydro-Electric Power Commission of Ontario were engaged, on behalf of the defendants the Electric Steel and Metals Company Limited, in installing a new electrical system with high tension wires at their transformer station in Welland, and that, on the date named, while doing so, and before carefully and prudently completing the installation, the defendants the Hydro-Electric Power Commission of Ontario, wrongfully and negligently and without due inspection, turned on the electric current, thereby causing an excessive current to go into the oil-switch, and causing an explosion therein. He also says that the premises of the defendants were thereby rendered dangerous and unsafe for the officers and employees of the defendants the Electric Steel and Metals Company Limited, and in particular himself.

The defendants the Electric Steel and Metals Company Limited, in answer to the plaintiff Young's claim, say that, under a contract between the defendants the Hydro-Electric Power Commission of Ontario and the Welland Power Commission, the former own the electrical system complained of by the plaintiff—the Electric Steel and Metals Company Limited having only an option to purchase it. They also say that if, therefore, the said installation was not carefully completed, or if no proper inspection

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thereof was made, or if the current was negligently turned on, or if the premises were rendered unsafe, it was the fault of the defendants the Hydro-Electric Power Commission of Ontario.

The defendants the Hydro-Electric Power Commission of Ontario deny that the injuries of the plaintiff were caused by their negligence or that of their employees. They also say that the electrical system was carefully installed and inspected before the current was turned on, and that the plaintiff was not injured by reason of an excessive current having entered the oil-switch. They also say that the plaintiff was not present at the transformer station at the time of the explosion by the invitation, direction, or order of these defendants, or of any person in their service to whose orders he was bound to conform and did conform. They plead that his injuries were sustained through his own negligence.

The work on the transformer station in question came to be done in the following way. The steel company, desiring to be supplied with power, entered into negotiations early in 1914 with the Hydro-Electric Power Commission of Ontario. It then being necessary for them to purchase a transformer, they obtained a written proposal, dated the 20th January, 1914, from the Canadian Crocker-Wheeler Company Limited, which they accepted on the 27th January, 1914, and under which the Crocker-Wheeler company agreed to furnish them with: "*Alternate 'C'*". One (1) —900 K.V.A. 45700 (Star), 26400 (delta) volts to 90–100–110 volts, three phase, 25 cycles, oil insulated, water cooled transformers." And part of the data as to the transformers incorporated in such proposal is as follows: "900 K.V.A. 25 cycles, 3 phase, 45700 star connected high tension 26400 delta connected low tension 100 volts. Taps to give 90,110 volts on low tension. This transformer is wound to operate with the high tension terminals star connected for a line voltage of 45,700 volts and with a low tension terminals delta connected for a line voltage of 100 volts."

Correspondence followed between the steel company and the Hydro-Electric Commission of Ontario about the plan of their transformer station and the location therein of the transformer. A transformer is an apparatus which, by the utilisation of the phenomena of magnetic induction, is used for the changing of

the ratio of electric potential from a higher to a lower value, or *vice versâ*. This is done by allowing the electric current to pass through an insulated coil of wire of a different number of turns, the coil being wound so as that it partly surrounds an iron core. The secondary or low tension current, which is entirely separate and distinct from the primary or high tension current, passing through the above coil, is generated in a second coil on the same iron core, and frequently in close mechanical relationship to the primary current.

While it is the Hydro-Electric Power Commission of Ontario who build the extension line necessary to supply the power, and supply and erect the apparatus to carry it to the customer, the actual contract for the sale and purchase of the power is made with local power commissions, of which there was one at the town of Welland.

The Hydro-Electric Power Commission of Ontario got in touch with this local commission, and on the 12th April, 1914, the local commission passed the following resolution: "That the Hydro-Electric Power Commission of Welland request the Hydro-Electric Power Commission of Ontario to build an extension line to the plant of the Electric Steel and Metals Company Limited, also to install the necessary equipment to be used in supplying power to the above-named concern. The said line and equipment to be subject to be taken over by the Welland Hydro-Electric Power Commission at any future date that they may be desired to do so."

In consequence, on the 16th April, the Hydro-Electric Power Commission of Ontario wrote to the steel company as follows: "The Hydro-Electric Power Commission of Welland have passed a resolution requesting the Hydro-Electric Power Commission of Ontario to build the extension of lines necessary to supply power to the plant of the Electric Steel and Metals Company Limited, and also to install the necessary switches and equipment to supply this power up to the transformers which are to be installed by your company. That part of the apparatus which under ordinary conditions would be installed by your company and is to be installed by the Hydro-Electric Power Commission of Ontario, will have to be charged for in the monthly power bills of the Welland Commission, *i.e.*, interest and sinking fund on the

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necessary investment, the understanding being that your company have the privilege of purchasing this equipment at any future time that they may decide to do so."

To this the steel company replied on the 20th April as follows: "We beg to acknowledge receipt of your favour of the 16th inst. notifying us of the resolution of the Hydro-Electric Power Commission of Welland requesting the Hydro-Electric Power Commission of Ontario to build an extension to the necessary lines to supply power to our plant, also to install the necessary switches and equipment to supply power up to the transformers. We are quite agreeable to the arrangement you mention, that the part of the apparatus which is usually installed by the company will in this instance be supplied by the Ontario Hydro-Electric people," etc.

These letters indicate what appears to be the practice, namely, that, while local hydro-electric commissions enter into contracts for the sale of power, they look to the Hydro-Electric Power Commission of Ontario to undertake and perform such part of the work as they are obliged under the contract to do, and so in the present case the Welland Power Commission arranged with and looked to the Hydro-Electric Power Commission of Ontario to do the work mentioned. The construction of the line was thereupon commenced by the Hydro-Electric Power Commission of Ontario; the actual work of constructing the apparatus outside and inside of the transformer station and up to the transformer being placed by them in the charge of one Miller, said to have been a competent electrical construction expert. He was apparently given no written instructions, and it is said that his instructions were that he should do the high tension construction work.

The duty of inspecting the high tension construction work was placed in the hands of an electrical engineer named Johnston, employed by the Hydro-Electric Power Commission of Ontario.

The transformer was delivered by the Crocker-Wheeler company at the premises of the steel company, and was set up in the transformer room, in its designated place. It appears that the steel company was desirous of having the Hydro-Electric Power Commission of Ontario do the secondary wiring for the service transformer. Accordingly, on the 23rd July, 1914, they wrote to the Chief Engineer as follows: "We hope you are not

overlooking the wiring of our transformer room. We are not sure whether this will be done by the local Hydro-Electric Commission or by your men, but we think this work should be proceeded with immediately, so there will be no risk of a delay from this end when the power is on the spot." And again, on the 1st September, the steel company wrote to the Hydro-Electric Power Commission of Ontario as follows: "Your Mr. Miller, who is working in our transformer house, appears to have had no instructions to put in the secondaries for the service transformer; and, as we should like you to arrange to do this work, we shall be glad if you will give him instructions." On the 3rd September, the Hydro-Electric Power Commission of Ontario wrote to the steel company as follows: "In reply to your favour of the 1st inst., in which you state that you would like us to arrange to do the work in connection with the secondary wiring for the service transformers, our instructions from the Welland Hydro-Electric Commission were to do the 46,000 volt work only, and our work has been arranged accordingly. In fact, we pointed out to you in one of our letters some time ago that it was our understanding that you were to do all the secondary wiring. If it were not for the fact that we have work mapped out for Mr. Miller which is urgent, we would only be too pleased to undertake this work for you on a cost basis."

The steel company thereupon proceeded to do the secondary wiring. The work of setting up the transformer and of doing this wiring was under the charge of the plaintiff Young, an electrical engineer employed by the steel company, and the actual work was in part done by the deceased man Howarth, an electrical mechanic.

The transformer is about eight feet high, oval in shape, and about seven feet across. The object of the transformer is to secure safety by the separation of the high potential primary circuit and the low potential circuit, any contact between the two in the converter being a source of danger. This transformer is what is known as the oil insulated one, and care is required that it shall be filled with the proper kind of oil. For the purpose of leading the high tension wires into the transformer so as to connect therein with the high tension coils, there are what are known as "bushings," or what may be termed insulated pipes through which

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the high tension wires are brought down to the top of and introduced into the transformer. Below the top of the transformer and inside thereof is a board called the terminal board. The bushings are carried through holes in the top of the transformer, and in the terminal board and through them the high tension wires are brought into the transformer, where they are "connected up," as it is termed, with the high tension coils, by tying the ends with nuts or other appliances. The holes in the terminal board are numbered, and it is said that the difficulty arose and the explosion resulted from the fact that the high tension leads had been connected to points "three" on the terminal board instead of to points "one."

The evidence of an electrical engineer, named William Gordon McGhie, who examined the transformer shortly after the explosion, puts the matter in this way:—

"Q. 40. What is underneath the boards? A. Immediately underneath the boards are the leads that lead down to the windings of the transformer; the points 'three' are connected underneath the board by solid copper, which does not go through the windings, and which caused in this case a dead short circuit, or, in electrical terms, a high tension neutral.

"Q. 41. The high tension wires are brought how into the transformer? A. Through the high tension bushings.

"Q. 42. They go first through the oil-switch? A. The oil-switch is there to allow the circuit to be broken safely and to prevent arking. The switch will trip out in case of overload. In order to break a switch of that high tension you have to have it immersed in oil; there would be too much arking if you broke it in the air.

"Q. 43. These high tension wires were connected at points 'three'? A. Yes.

"Q. 44. And thereby caused a short circuit by reason of the copper underneath? A. Yes.

"Q. 45. Where should they have been connected? A. The high tension should have been connected to 'one' as shewn on the diagram.

"Q. 46. What kind of a transformer do you call this? A. Oil immersed, water cooled, three face, furnace transformer.

"Q. 47. Were any defects found in the transformer? A. The

transformer was practically as good as when it was shipped from the shop.

"Q. 48. As far as the transformer was concerned, was it in safe condition? A. Yes, sir.

"Q. 49. Nothing defective about it? A. No, sir.

"Q. 50. What was the result of the short circuit? A. The oil-switch would be so heavily overloaded it would not be able to break the circuit safely. It would cause such a large ark inside the switch, it would cause an explosion; in this case it was the bottom of the oil-tank that was blown out.

"Q. 51. Was that evident from the examination you made? A. Yes. I was more interested in the transformer, but I saw that the oil-switch was blown out. There were three oil-switches, and they were all blown out.

"Q. 52. That would be dangerous? A. Yes, sir.

"Q. 53. Why were the oil-switches not serving their purpose? A. They are only supposed to be put to a certain capacity. Due to the short circuit, they were so overloaded, they could not be expected to serve their purpose.

"Q. 54. What caused the overload? A. The overload was caused by the current which flowed through the short circuit."

Upon all the expert evidence, it appears plain, and indeed it was practically admitted, that the cause of the explosion was this wrong connection. If the transformer fails to perform its functions, and the high potential current passes into the interior wiring, an explosion in the oil-switch is a natural result. It was the duty of either the steel company or the Hydro-Electric Power Commission of Ontario, through its officials, to exercise a high degree of care in making this connection and to inspect this particular part of the work before the power was turned on. The steel company had bought the bushings with the transformer, but it appears from the evidence that Miller put them up.

On the 23rd July, the steel company wrote to Mr. Gaby, the Chief Engineer of the Hydro-Electric Power Commission of Ontario, and said: "We hope you are not overlooking the wiring of our transformer room; we are not sure whether this will be done by the local Hydro-Electric Commission or by your own men, but we think this work should be proceeded with immediately so there will be no risk of a delay from this end when the power is on the spot."

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On the 27th July, the Hydro-Electric Power Commission of Ontario wrote to the steel company, and among other things said: "We understand that you have the transformers and oil-switches on the job complete with bushings assembled."

On the 1st September, the steel company acknowledged a letter from the Hydro-Electric Power Commission of Ontario, in part as follows: "We beg to acknowledge receipt of your favour of the 21st Aug., in which you asked us to supply you with copies of all correspondence which passed between the Canadian Westinghouse Company Limited and ourselves, on the subject of the oil-breakers."

On the 24th September, the Hydro-Electric Power Commission of Ontario wrote to the steel company: "We have instructed our Mr. G. H. Miller to forward to you from the Electric Steel and Metals station at Welland samples of several lots of transformer oil."

On the same day, they wrote to Miller as follows: "Confirming 'phone message of the 23rd by W. Amos, we ask you to forward to our Mr. Dobson, Toronto Laboratory, Strachan avenue, by express, quart samples of oil carefully taken from the 900 K.V.A. transformer, each of the 100 K.V.A. transformers, and from the oil for the current and potential transformers. It will be satisfactory for you to fill with oil and to place in service the current and potential transformers without first drying them out, since you state that you have closely inspected the transformer windings and can detect no moisture on them."

On the 14th October, Johnston made a written report to the Hydro-Electric Power Commission of Ontario, in which he said: "I have instructed Mr. Miller to be in Welland on Friday the 16th to complete erection, so that the station can be made alive for service on Saturday morning. Mr. Turnbull says expects power on Saturday morning the 17th. I expect to be in Welland some time Friday to see that station is O.K." Turnbull is the president of the steel company.

On the 17th October, Johnston seems to have considered that the work which the Hydro-Electric Power Commission of Ontario had to do in connection with the high tension wiring and installation had been completed. His evidence is that he had inspected all the high tension work done by the Hydro-Electric Power

Commission of Ontario up to the transformer. In the transformer room on that day, and at the time of the accident, were Miller, Howarth, Young, a man named Lefevre, and Johnston. The latter says he did not inspect the furnace transformer, as he did not consider it was part of his duty to do so.

Mr. Gaby, the Chief Engineer of the Hydro-Electric Power Commission of Ontario, gave evidence at the trial and said that all of the high tension work should be inspected before the power was turned on, and that, if this were not done, the inspector would not be doing his duty or carrying out the Commission's instructions; also, that it is the usual custom to turn on the power after inspection. He said, also, that a man who was near the apparatus when the power was about to be turned on should know it, as there was apt to be danger, and the closer he was the greater the danger. He said that he would let those know who had business to know and might be near when the power was about to be turned on.

Johnston says that Young asked him when he was going to turn the current on, and he replied, "Some time to-night," and as soon as he could get sufficient oil for the service transformer switch. This was a switch that had to do with the service transformer, but not with the furnace transformer. He said he asked Young if his furnace transformers were all right, and Young replied "Yes," and that thereupon he said, "We can turn on the current in five minutes," and went over to the transformer house, Young following him. Young says that Johnston said to him, "Are you ready?" and he replied "Yes," meaning as to his part of the work, namely, the low tension wiring of the transformer. He says that Young did not say he was going to make a test. He also says that he knew the power was going to be turned on, but expected to have some further warning. Johnston further says that he then did what was necessary to prepare to turn on the current, all the men mentioned being present and able to see what he was doing. While he thinks that the men knew that he was about to turn on the power, he cannot say that he gave them a definite warning or notice to that effect. He says that he then went to the lever for opening the oil-switch, which was on the outside of the wall in the furnace-room, and that, when he pulled the remote control-switch and the current came on, there was an

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explosion, the oil in the switches was ignited and scattered around, and the men were burned and injured thereby.

It appears that Miller and Lefevre also died as a result of their injuries.

The work had been practically all done before the actual written agreement between the Welland Power Commission and the steel company was executed. It is dated the 15th October, 1914, and provides for the steel company taking power exclusively from that Commission from the date thereof to the 19th December, 1929. It contains, among other terms, the following:—

“2. (j) The customer shall erect a sub-station approved of by the Commission, and shall supply, install, and operate the electrical equipment in the same manner as instructed by the Commission. The customer shall be responsible for the proper inspection and maintenance of all this station equipment, except such as has been installed by the Commission.”

“3. (e) The customer shall select and use transformers and apparatus suitable to receive the electric power produced by the apparatus of the Commission . . . all apparatus, machinery, and wiring to be approved of by the Commission.”

The first important question for me to determine is, who actually took the high tension wires through the bushings in the top of the transformer and through the holes in the terminal board, and connected them with the high tension wires underneath?

Two men at the trial testified that they saw Miller doing work inside the top of the furnace transformèr, which would seem to point plainly to his having made the connection. One of these is the plaintiff Young, and the other is a labourer named Thompson.

At the inquest, which was held soon after the accident, and when he was still suffering severely from his injuries, Young was asked whether Miller had made the connections inside the transformer and through the terminal board, and his evidence then appears to have been as follows: “I presume he did the connecting . . . I could not say.” At the trial before me he said: “I saw Miller with his hands through the holes. It was a work of feeling more than seeing. He made the connections. . . . This was a month or six weeks before the accident.” He endeavoured to explain the apparent discrepancy in his evidence

by stating that at the inquest he was still suffering so badly that his mind was in a state of confusion, and he could not recollect clearly what had occurred.

Thompson, at the inquest, in reply to a question, "Had Miller anything to do with the putting in of the transformers?" gave the answer, "I don't know, I never saw him do anything like that." At the trial he said that he saw Miller fixing wires in the transformer room. He also said: "He fetched the big wires from above and connected them with the small wires in the hole; he was working with the wires in there, the thick wires outside and small ones inside, about an hour with his hands in the hole, on one day about a month before the accident." He was also asked certain questions and gave the following answers at the trial:—

"Q. Did you tell about the bushings and the wiring in connection with it at the inquest? You mentioned that at the inquest didn't you? A. I think so, I am not sure.

"Q. You were examined all about this at the inquest? A. Yes.

"Q. You told it all at the inquest? A. Yes.

"Q. Explained what you are telling now? A. Yes, just the same."

The contention on behalf of the Hydro-Electric Power Commission of Ontario is, that the expression "up to the transformer" is to be construed to mean that it was no part of their duty to take the high tension wires into the transformer at all. While the word "to" has various meanings, such as "in a direction toward" or "toward and ending at," it seems to me that in the present case it must mean more than this. The power was to be supplied by the Hydro-Electric Power Commission of Ontario. The work of the Commission was not effective for the purpose of introducing the power until their high tension wires were brought into contact with the high tension wires inside the transformer and these were tied together. The introduction of the high tension wires into the transformer, and bringing them in contact with the high tension wires therein, and tying these together, was an important mechanical work and one which might be the occasion of great danger unless properly done. It was the Hydro-Electric Power Commission of Ontario which was furnishing the high tension current and erecting the apparatus for that purpose. They seem to require and are given extensive powers under the Act. They

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are equipped with skilled and competent men to construct, install, and inspect. It seems to me that—the contract not being clear as to who was to make the connection within the transformer of the high and low tension wires, and it having been found by me that Miller, having erected the bushings, carried them through the top of the transformer, thereby bringing the high tension wires into it, and made the connection therein between the high tension wires—the principle enunciated by Lord Blackburn in *Mackay v. Dick* (1881), 6 App. Cas. 251, at p. 263, can well be applied. This is what he says: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

While the evidence of Young and Thompson is perhaps not as satisfactory as it might be, I am unable to discredit them where they say in definite terms that they saw Miller making the connections or doing the work which must obviously have been for that purpose. I find, therefore, as a fact, that he made the connections, and did so in the course of the work of which he was in charge, as construction foreman for the Hydro-Electric Power Commission of Ontario. I am unable to see from the evidence that, before turning on the power, Johnston made that careful inspection of the transformer, and the connection between the high and low tension wires therein, that, in the circumstances, it was proper for him to make. Young and Howarth had been engaged in setting up the transformer and in doing work upon it, and I am unable to see that there was any negligence on their part in being present in the transformer room of their employers, the steel company, at the time the accident occurred. It was, I think, the duty of Johnston to warn them specifically, before turning on the power, to keep a reasonably safe distance from the furnace transformer and switches.

Upon these findings, I come to the conclusion that the explosion occurred through the negligence of the employees of the defendants the Hydro-Electric Power Commission of Ontario, and that

these defendants are liable in damages, unless a defence set up by them is available as an answer. This defence is that, as the Commission is an "emanation from the Crown or an agent of the Crown," discharging duties in the interest of the public and without profit, it cannot be made liable for an act of negligence such as that in question herein. The Power Commission Act is R. S. O. 1914, ch. 39. Counsel for the plaintiff referred to the Interpretation Act, R. S. O. 1914, ch. 1, sec. 27: "In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall (a) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal," etc. In both the original Act creating the Hydro-Electric Power Commission of Ontario, namely, 1907, 7 Edw. VII. ch. 19, and in the present Act, a Commission is created. Nowhere, however, are they expressly made a corporation or body politic and corporate. But under the present Power Commission Act, there is a section (16) in the same terms as sec. 23 of the original Act, and to the following effect: "Without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office." It is said that in the present cases application was made to the Attorney-General, some time after the actions were commenced against the steel company, for his consent to the actions being brought against the Hydro-Electric Power Commission of Ontario also; and, such consent being given, the defendants the Hydro-Electric Power Commission of Ontario were accordingly added.

It seems to me that it is implied in this consent that, if the Commission should be held to be liable in the actions, judgment may be pronounced against them. I think this differentiates these cases from such cases as *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O. R. 1, and *Roper v. Public Works Commissioners*, [1915] 1 K. B. 45, and cases therein referred to. Reference also to *Re City of Ottawa and Provincial Board of Health* (1914), 33 O. L. R. 1.

The deceased man Howarth was a young man and unmarried, and was at the time of the accident earning regularly about \$50 or \$60 per month. He lived part of the time at home, and

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assisted his parents with money before the father died, and, according to the plaintiff's evidence, gave her more money thereafter. There were other three children. In the circumstances, and having regard to future contingencies, I think a fair sum for me to allow as damages would be \$1,000.

The plaintiff Young was at the time of the accident 33 years of age and earning \$160 a month. He was badly burned and obliged to remain in the hospital for five weeks. He left it for a time, but went back again to have some "skin grafting done." He was burned on the face, neck, hand, left arm, and down the back. He testifies that he was in perfect health before the accident, but that his nervous system has been badly affected. He says, further, that his left arm is still "tied" in consequence of a skin formation resulting from the burn and that he cannot lift it above the shoulder. The medical testimony is to the effect that this may be remedied in good part by a further operation. Hospital, medical, and drug bills, and bills for supplies and appliances, were put in, amounting to \$1,100. When examined for discovery, this plaintiff said that he did not expect to pay some of these bills. His explanation at the trial about this was that he expected the defendants to do so. He was paid his wages by the steel company up to the 15th February, 1915. He has for some time past been associated with Mr. Turnbull in another company, where, upon the evidence, he is probably earning as much money as before the accident.

While on the whole he has made a good recovery and may still improve, it is difficult to say to what extent the nervous condition in which the accident has left him may affect him in future. He has, no doubt, also suffered considerable pain. I have concluded to fix his damages at \$2,500.

Each of the plaintiffs will therefore have judgment for the sums mentioned, with costs, as against the defendants the Hydro-Electric Power Commission of Ontario.

The actions will be dismissed as against the steel company, but, under the circumstances, without costs.

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Feb. 9.

RE SWAIN.

Lunatic—Appointment of Committee—Place of Residence—Jurisdiction of Court.

The Court will not appoint as sole committee of the estate of a lunatic a person resident out of the jurisdiction of the Court.

Ex p. Ord, In re Shields (1821), Jac. 94, followed.

In re Bruère (1881), 17 Ch.D. 775, and *In re Hopper* (1897), 66 L.J. Ch. 569, explained.

THIS was an application for an order declaring Janet Swain a lunatic and appointing her son, John McLellan Swain, sole committee of her estate within Ontario.

February 8. The motion was heard by LATCHFORD, J., in Chambers.

J. J. Coughlin, for the applicant.

No one appeared to oppose the application.

February 9. LATCHFORD, J.:—Mrs. Swain has been confined as a patient in the Provincial Asylum for the Insane at North Battleford, in the Province of Saskatchewan, since July, 1915. Evidence is submitted indicating that she is suffering from chronic dementia, and that there is no hope of recovery. She is possessed of property within Ontario of the value, approximately, of \$9,000.

No evidence is before me that Mrs. Swain has been declared a lunatic by a Court of the Province of Saskatchewan, or that she is a lunatic according to the laws of that Province.

Her son and only child, who applies to be appointed her committee, resides at North Battleford.

Service of notice of the application appears to have been made upon Mrs. Swain at North Battleford, pursuant to leave of the Master in Chambers; and the application is not opposed.

It is urged that *In re Bruère* (1881), 17 Ch. D. 775, is authority for the appointment of a committee not resident within the jurisdiction of the Court. The head-note to the case is misleading in not stating the material fact that but one of the two persons sought to be appointed resided in Ireland, outside the jurisdiction of the Court. He was, however, in the habit of constantly going to England, and was in all respects a fit and proper person to be appointed a committee of the lunatic, *jointly with a person resident*

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within the jurisdiction. The Court accordingly directed that, upon a favourable report from the Master, the order appointing him *one* of the committee might issue.

In *In re Hopper* (1897), 66 L.J. Ch. 569, the lunatic, resident in England, was entitled to property of considerable value in Russia, where her son J. R. Hopper resided. It was the unanimous wish of her sons and daughters, who were her sole next of kin, and entitled under her will to her property, that J. R. Hopper should be appointed sole committee. The Court (Lindley, A. L. Smith, and Rigby, L. J. J.) refused the application as made, and appointed a daughter, living in England, committee of the lunatic's person, and the daughter and her brother, J. R. Hopper, joint committee of the lunatic's estate.

In *In re Bruère* and *In re Hopper*, one of the joint committee was always within the jurisdiction of the Court, and could be made answerable for any dereliction of duty. The principle laid down by Lord Chancellor Eldon in *Ex p. Ord, In re Shields* (1821), Jac. 94, that the (sole) committee of a lunatic ought to be resident within the jurisdiction of the Court, has never been departed from. The cases cited, when carefully scrutinised, strongly affirm the principle. It is further to be observed that the control conferred upon the Court by the Lunacy Act, R. S. O. 1914, ch. 68, in regard to the committee of a lunatic, cannot be exercised beyond the ambit of the Court's jurisdiction.

The application accordingly fails.

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Feb. 10.

MCDONALD V. LANCASTER SEPARATE SCHOOL TRUSTEES.

Contempt of Court—Disobedience of Judgment—Motion to Commit Defendants—Preliminary Objections—Non-compliance with Rule 298—Irregularity—Direction for Service of New Notice of Motion—Failure to Specify Portions of Judgment Disobeyed—Condonation—Rules 183, 184—Cessation from Act Constituting Contempt—Separate School Trustees—Employment of Unqualified Teacher—Use of French as Language of Instruction—Misconduct—Imposition of Fines—Locus Penitentiae—Undertaking—Costs.

Where the proceedings upon a motion by the plaintiff to commit two of the defendants for contempt of Court were technically irregular by reason of non-compliance with Rule 298, it was *held*, that the Court had power to condone the irregularity, and it was suggested that the irregularity had been cured by the course which the proceedings had taken; but, for greater security, the motion was retained, and the plaintiff allowed to serve a new notice of motion.

A new notice of motion having been served, it was objected on the return of it, that it did not specify any particular term or clause of the judgment in respect of disobedience to which commitment was asked:—

Held, applying Rules 183 and 184, that the objection should be overruled and the irregularity, if any, condoned.

Rendell v. Grundy, [1895] 1 Q.B. 16, and *Petty v. Daniel* (1886), 34 Ch.D. 172, followed.

Where a contempt has been committed, it is not cancelled, obliterated, or purged by mere cessation from the act constituting contempt; and in this case the jurisdiction to entertain the plaintiff's motion to commit the respondents for breach of the injunction contained in the judgment of *FALCONBRIDGE, C.J.K.B.*, 31 O.L.R. 360, affirmed by the Appellate Division, 34 O.L.R. 346, was not ousted, by cessation, before the service of the second notice, from one of the acts complained of—the continuing to employ an unqualified teacher in the school of the section of which the respondents were trustees.

The respondents were guilty of contempt in that respect, and also in allowing the use of French as the language of instruction or communication in the school, and there was nothing to shew that that use had been discontinued.

The respondents in their disobedience of the injunction were guilty of actual misconduct; there was no ground for saying that they had honestly misinterpreted the terms of the judgment.

The respondents were ordered to pay fines and the costs of the motion from the time of the service of the second notice; but the issue of the order was stayed for a limited period to allow the respondents an opportunity of paying the costs and filing an undertaking as to their future acts; and it was directed that, upon their so doing, the issue of the order should be perpetually stayed.

MOTION by the plaintiff to commit the defendants Médéric Poirier and John Ménard for contempt of Court in disobedience to the judgment pronounced by *FALCONBRIDGE, C.J.K.B.*, on the 8th May, 1914, and affirmed by the Appellate Division on the 12th July, 1915. See 31 O. L. R. 360, 34 O. L. R. 346.

January 12. The motion was heard by *MASTEN, J.*, in the Weekly Court at Toronto.

J. A. Macdonell, K. C., for the applicant.

A. C. McMaster, for the respondents.

J. A. McEvoy, for the Department of Education for Ontario.

February 10. *MASTEN, J.*:—Motion by the plaintiff, applicant, to commit the defendants Médéric Poirier and John Ménard (respondents) for breach of an injunction dated the 8th day of May, 1914.

Paragraphs 2 and 4 of that judgment are as follows:—

“2. This Court doth order and adjudge that the said Board of Trustees of the Roman Catholic Separate School for Section Number 14 in the Township of Lancaster, and Médéric Poirier, Emérie Ouimet, and John Ménard, the trustees of such board, be and they and all of them are hereby restrained from continuing to employ the defendant Léontine Sénécal as a teacher in the

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Roman Catholic Separate School in School Section Number 14 in the said Township of Lancaster, so long as she is disqualified from acting as such teacher under the regulations of the Department of Education for the Province of Ontario, and that they and all of them be and they are hereby restrained from using the rates of said Roman Catholic Separate School, or any of such rates, for the payment of the said Léontine Sénécal as a teacher in said Roman Catholic Separate School, as long as she is so disqualified, or any other teacher not properly qualified according to the said regulations."

"4. And this Court doth further order and adjudge that all the said defendants, and each of them, be and they are hereby restrained from using or allowing the use of French as the language of instruction or communication in the said school, so long as the same shall not be permissible under the said regulations."

Three breaches of this judgment are alleged:—

(a) That the respondents, in breach of paragraph 2 of the judgment, have, since the month of July last, employed, as a teacher in the said school, one Florence Quesnel, a teacher not properly qualified according to the regulations.

(b) That the defendants have directed and allowed the teaching of French as a language in the school.

(c) That the defendants have allowed the use of French as the language of instruction or communication in the said school, and that such use has not been made permissible under the regulations.

The facts are plain. Florence Quesnel was employed by the respondents as teacher of the school in question down to the 27th day of December. From July, 1915, until she resigned, she was not properly qualified according to the regulations.

The defendants have directed and allowed the teaching in the school of French as a language.

This act is not prohibited by the judgment for contempt of which the motion is brought.

I find that the defendants have allowed the use of French as the language of instruction or communication in the school in connection with the teaching of the Catechism, and I find that such use has not been made permissible under the regulations.

Certain technical difficulties have, however, arisen in connection with the application, and to these I now address myself.

The motion was first argued before me on the 11th day of November, 1915, pursuant to notice dated the 16th October, 1915, the defendants by their counsel expressly waiving all irregularity in the proof of service on the respondents of the injunction order upon which the motion was founded, but objecting that there was no proof of service on the respondents of the judgment of the Court of Appeal confirming that order. In view of the fact that the judgment was not varied by the appellate Court, and that the respondents were represented on the appeal by counsel, this objection was overruled. On the hearing of that application, counsel for the respondents stated, on their behalf, their desire to conform fully and unreservedly, not only to the formal judgment, but to the views of the Court, and to the regulations of the Department. With the view of affording an opportunity of so doing, and on the suggestion of counsel for the Department of Education, the motion, after argument, stood enlarged until Tuesday the 14th December, 1915, and leave was granted to all parties to file further material, with the view of informing the Court what steps had then been taken to conform. The motion was from time to time enlarged until the 27th December, and on that date was reargued. At the conclusion of that argument judgment was given on certain phases of the motion as follows:—

“This is a motion based on a notice dated the 16th day of October, 1915, given on behalf of the plaintiff, asking that the defendants Poirier and John Ménard may be committed to the common gaol of the county or of the united counties in which they may be found, for breach of a judgment pronounced herein by the Chief Justice of the King’s Bench, dated the 8th May, 1914.

“The grounds set forth in the notice of motion are the breach by the trustees of the judgment, in continuing to employ as a teacher in the school a person not properly qualified by the regulations of the Department, and in allowing the use of French as a language of instruction and communication in the said school. These are the only two grounds upon which the motion is based.

“The notice of motion so launched was served on the 18th October on Poirier and Ménard, and on the 19th October on the

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firm of Messrs. Belcourt, Ritchie, & Company, and on the 21st October it was further served.

"I observe that the affidavits filed in support of it are filed on the 9th November, some time after the service of the notice of motion.

"Rule 298 requires that affidavits upon which a notice of motion is founded shall be filed before the service of the notice of motion, and all other affidavits shall be filed before they are used.

"I have considered very carefully whether the application should be refused on this technical ground, or whether the course which the motion has taken in having, after argument, been enlarged at the suggestion of the Attorney-General, concurred in by both parties, with leave to all parties to file and serve further material, and further material having thereupon been adduced by both parties, and having come up again and having been further enlarged on the 21st instant, with leave to either party to cross-examine—the parties to facilitate by producing deponents for cross-examination on notice to solicitors—whether this course has cured the irregularity above noted. It is, naturally, of the first importance that in a motion of this kind the application should be well-founded, and that there should be no possibility of its being subsequently determined that any order which was made was bad because all formalities had not been complied with.

"In Oswald on Contempt of Court, 3rd ed. (1910), p. 210, the rule is laid down in this way: 'Care should be observed in settling, serving, and proceeding upon a notice of motion to commit, or for leave to issue a writ of attachment, because the Court is 'jealous of the personal freedom of the subjects of the Crown;' and where the liberty of the subject is in question, always requires the utmost strictness in procedure. Applications affecting the liberty of the subject are matters *strictissimi juris*; and although an irregularity in the course of proceeding for attachment or committal does not render the proceedings void, and the Court has power to condone the irregularity, yet slips in the practice, where the liberty of the subject is concerned, are seldom allowed by the Court to be got rid of under this power, and in many cases delay and expense have been incurred, and even justice defeated, by slips and irregularity in the proceedings.'

"The above extract well states the principle which has always been applied by the Courts of this Province in dealing with such an application. Though it is possible that the irregularity which exists in this case may have been overcome by the course of events above outlined, nevertheless, for greater security, I have come to the conclusion that the proper course to pursue will be to direct that this motion stand over and be retained by the Court as at present constituted, and that a new notice of motion be served on the respondents, returnable on the 12th January next, based upon the matter now filed in support of this present application.

"I think it undesirable that an order should be pronounced at this stage and on this notice of motion, as it has been served irregularly. The present direction will therefore be as above stated.

"In doing so, I think it desirable to express the view that I now entertain regarding some of the points that have been argued, hoping that it may assist in reaching a conclusion that will be less onerous than might otherwise be the case.

"I am of the opinion that on a proper consideration of the second paragraph of the judgment above mentioned, the concluding clause, 'or any other teacher not properly qualified according to the said regulations,' relates back to the first prohibition contained in the paragraph, and applies to it as well as to the second; so that, for the purposes of this motion, the paragraph may be read as follows: 'This Court doth order and adjudge that the said Board of Trustees of the Roman Catholic Separate School for Section Number 14 in the Township of Lancaster, and Médéric Poirier, Emérie Ouimet, and John Ménard, the trustees of such board, be and they and all of them are hereby restrained from continuing to employ . . . any other teacher not properly qualified according to the said regulations.' If that is the correct interpretation of the second paragraph, it is manifest, upon the facts here disclosed, that the defendants have committed a breach of the injunction, and have been guilty of contempt.

"Then, with respect to clause 4; as far as I am able to see, the teaching of the Catechism in the school in the French language is using the French language as a language of instruction and communication, in the terms of clause 4 of the judgment. I should be inclined, I think, to give effect to the argument of

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Mr. McMaster that this judgment, as at present framed, does not deal with the teaching of the French language as a language, and that the mere teaching of the French language as a language is not therefore a breach of this judgment. If the written judgments of the Court of Appeal and of the Chief Justice of the King's Bench, as they seem to do, express the opinion that the teaching of French is not permissible, the judgment may perhaps be supplemented by incorporating in it such a declaration.

"All that I have now to consider is, whether there has been a breach of the formal judgment, as it stands at present. As to the effect and result of any breach, this remains to be dealt with when the motion comes before the Court on the 12th January, and I say nothing further.

"The Rules of the Court are ample for dealing with the matter either by commitment or by fine, or partly by one and partly by the other."

The pending motion was thus enlarged until the 12th day of January, 1916, with a direction that the applicant should serve a supplementary notice of motion, returnable on that date. Accordingly, such notice was served. All the material theretofore filed in support of the pending motion is referred to in such notice. On the return of the motion, affidavits were filed on behalf of the respondents shewing that the defendants had, on the 27th December, procured Miss Florence Quesnel to resign as teacher of the school in question, and that such resignation had, on the 30th day of December last, been notified to the solicitors for the applicant.

The motion was finally argued on the 12th day of January, and now comes up for judgment.

Counsel for the respondents takes a preliminary objection to the supplementary notice of motion, dated the 31st December, 1915, and served on the 3rd January, 1916, viz., that the notice does not specify any particular term or clause of the injunction in question for the breach of which committal is asked.

I have carefully read the cases referred to in support of this objection, viz., *Hipkiss v. Fellows* (1909), 101 L. T. R. 516; *Taylor v. Roe* (1893), 68 L. T. R. 213; *In re Seal*, [1903] 1 Ch. 87; and Halsbury's Laws of England, vol. 17, p. 295; also some other cases.

Rule 184 of our Rules of Court provides that "non-compliance with the Rules shall not render the writ or any act or proceeding void, but the same may be set aside, either wholly or in part, as irregular, or may be amended, or otherwise dealt with, as may seem just."

This Rule, for the purpose of this application, is substantially like Rule 1037 of the English Rules of Practice, under which it has been determined that the Rule applies to motions to commit or attach; that the Court has the same jurisdiction in such cases to condone irregularities as in other cases; but that such discretion will not be readily exercised in favour of an applicant where the liberty of the subject is involved. In the present case, considering the course which the motion has taken, and the provisions of Rule 183,* having regard also to the fact that this objection was not taken on either of the original arguments, though the notice was in like terms, that the original motion is still pending before me, that the present notice of motion is a formality supplemental to the original notice, and that no injustice can possibly arise to the respondents who have been fully aware for many weeks of the particular breaches complained of, I overrule this objection and condone the irregularity if any such exists. I refer to *Rendell v. Grundy*, [1895] 1 Q. B. 16, and to *Petty v. Daniel* (1886), 34 Ch. D. 172.

Counsel for the respondents next objected that, prior to the 3rd day of January, 1916, when the supplementary notice of motion was served, the respondents had effectually dispensed with the services of Florence Quesnel, by securing and accepting her resignation; and consequently that, at the date when this supplementary notice of motion was served, the respondents were not in contempt; that such motion is therefore irregular and unfounded, and should be dismissed with costs to be paid to the respondents.

This objection raises an important general question as to the nature of a contempt. No cases were cited in support of the respondents' contention; but, upon the best consideration

*183. A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

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that I can give the matter, I am of opinion that, where a contempt has been committed, such contempt is not cancelled, obliterated, or purged by mere cessation from the act constituting contempt. If that be the true principle, it must be capable of standing the following test. Assume that in the present case the respondents had continuously, since the date of the judgment, been not only transgressing the terms of the injunction, but blatantly stating that they defied the power of the Court, and that by their breach of the injunction the plaintiff had suffered irretrievable damage, and that on the day before the notice of motion for contempt was launched the respondents had complied with the injunction order. Would the fact of such compliance prevent the applicant from bringing to the attention of the Court the conduct of the respondents during the preceding period? Or would it prevent the Court from dealing with the contempt which had been committed?

Oswald on Contempt of Court, 3rd ed., p. 1, gives the following definition: "Contempt, in the legal acceptance of the term, primarily signifies disrespect to that which is entitled to legal regard. . . . In its origin, all legal contempt will be found to consist in an offence more or less direct against the Sovereign himself as the fountain-head of law and justice."

In *Rex v. Newton* (1903), 67 J. P. 453, Alverstone, L. C. J., said: "Quite apart from this particular case it ought to be plainly understood that applications for attachment for contempt are not proceedings taken, and ought not to be regarded as proceedings taken, by one party to redress a wrong or obtain pecuniary consideration." And the rule was there laid down that proceedings for contempt ought not to be settled by the parties except with the sanction of the Court.

As applied to the circumstances of this case, the contempt consists in the disregard of the law of the land as interpreted by the judgments of our Courts. It has become a question not merely of the use of French in this particular school, but whether the laws of Ontario, as interpreted by its highest Court, are to be obeyed.

If in Courts of law repentance condoned offence, offenders would multiply. On any other basis our Courts of Justice would soon lose their hold upon public respect, and the maintenance of law and order would be rendered impossible. I am of opinion

that the jurisdiction to entertain the motion now pending is not ousted by the cessation on the part of the respondents from the act complained of.

But, apart from the above considerations, it does not appear to me that this objection is well-founded on the facts of the case. I find that the respondents were guilty of contempt of the judgment of this Court in two respects: (1) By employing Florence Quesnel from July until the 27th December, 1915, she being, at the time, "a teacher not properly qualified according to the said regulations." (2) I find that they were guilty of contempt "by using or allowing the use of French as the language of instruction or communication in the said school," in teaching the Catechism. Both of these violations of the injunction continued down to the 27th day of December, 1915, and nothing appears upon this motion to indicate that the respondents, even down to the present time, have ceased to employ the French language as the language of instruction and communication in teaching the Catechism. This objection is, therefore, overruled.

Lastly, it is objected that this is not a criminal contempt, but is a contempt in procedure only in a civil action; that, in civil cases, the object of the motion to commit for contempt is only to secure the enforcement of the decree of the Court; that the matter principally complained of, viz., the employment of Florence Quesnel, has now been rectified; that, if a breach of the injunction has been committed, it has arisen through honest misinterpretation of the terms of the judgment, and was not wilful; that, when the true interpretation of the judgment was pointed out, obedience was rendered; and that the respondents now assert their desire to accord full and complete obedience to the judgment in every particular.

This objection might be formidable if the case was that of a money demand or other simple case, where compliance resulted in a full satisfaction of the private rights of the complainant. The present case is quasi-public in its nature, relating as it does to the rights of all the English-speaking supporters of the Separate School in question. As I have already pointed out, there has not been yet any full compliance with the terms of the judgment. Lastly, the circumstances strongly indicate to my mind that actual misconduct ought to be imputed to the respondents who have disobeyed the Court's order.

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On the hearing of the motion on the 11th day of November, counsel expressed unreservedly the desire and intention of the respondents to comply fully with all the requirements of the law, whether expressly set forth in the judgment of the Court or not. In his judgment at the trial, the Chief Justice of the King's Bench says (31 O. L. R. at p. 363) "that the use and teaching of the French language in that section, as at present carried on, are . . . unauthorised." And at p. 364: "The conduct of the defendants, in disregarding and defying the rulings and remonstrances of the Department and its officers, can be described only as recalcitrant and recusant. If they are, as they claim and as they seem to be, ignorant men, they ought to have sought competent legal advice; and, having failed so to do, they cannot claim to have acted in good faith. The rulings of the Department appear to me to have been entirely according to law."

Afterwards, having specially requested the Appellate Division to determine whether they were entitled in this school as constituted to teach French as a language, and having been informed, after full argument, that in this school as constituted it was not lawful to teach French as a language, they continued teaching it exactly as before; alleging (what is quite true) that the formal judgment as issued does not cover the point.

And again, having, as above mentioned, on the 11th day of November last, stated their desire and intention to yield free and full compliance with all the requirements of the Separate Schools Act, as it had been interpreted for them, they nevertheless continued down to the 27th day of December last conducting the school in a manner which had been determined to be illegal, and which now turns out to be in direct contravention of the terms of the formal judgment.

I cannot better indicate my view than by adapting the language of the trial Judge and saying that the conduct of the respondents in disregarding and defying the interpretation of the law by the highest Court of the Province can only be described as recalcitrant and recusant.

I think that, obsessed with a rigid and obstinate desire to carry matters on to the last ditch according to their own wishes, they have (whether there was any direct intention to disobey the order or not) disregarded not only the spirit but the letter of the Court's judgment.

In *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190, Warrington, J., discussing the meaning of "wilful disobedience," says (p. 194): "In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order." And he relies upon a similar view expressed by Chitty, J., in *Attorney-General v. Walthamstow Urban District Council* (1895), 11 Times L. R. 533.

I therefore find that the defendants Médéric Poirier and John Ménard have been guilty of contempt of Court, and I should add that I base such finding solely on the breach of the formal judgment as drawn up, and have referred to other matters only in connection with their statement that they desired to yield full compliance and for the purpose of testing their *bona fides* in that regard.

The order of the Court is, that Médéric Poirier and John Ménard be fined each in the sum of \$500, and do pay to the applicant, McDonald, his costs of the motion incurred as and from the 31st day of December, 1915, to be taxed, and that there be no costs to either party of the motion prior to the 31st day of December.

Having regard to the fact that the respondents claim to be ignorant men, and still assert themselves to be desirous of yielding compliance to the Court's order, I direct that this order imposing fine and costs as above do not issue for the space of one month from this date; and that, upon payment, within that period, by the respondents to the applicant, McDonald, of his solicitor and client costs, to be taxed, of all proceedings to commit from the 16th October, and upon the respondents each for himself executing and filing with the Registrar, within the same period, a written undertaking not to do any act tending towards the using or allowing the use of French as the language of instruction or communication in the Roman Catholic Separate School for Section Number 14 in the Township of Lancaster, and further undertaking, so far as lies in his power, to prevent the use of French hereafter contrary to law, the issue of the order hereby directed be perpetually stayed.

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RE CARPENTER LIMITED.

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Company—Winding-up—Contributories—Subscriptions for Shares—Allotment—Election of Directors—Non-compliance with Provisions of Part VIII. of Ontario Companies Act, 2 Geo. V. ch. 31—Cancellation of Applications for Shares.

Upon an appeal from the order of a Referee, in a proceeding for the winding-up, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, of a commercial company, incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, placing the names of five persons upon the list of contributories, it was held, that the company had never complied with the requirements of Part VIII. of that Act, and that persons who became subscribers for shares were entitled, notwithstanding the winding-up proceedings, to have their subscriptions cancelled and their names removed from the list of contributories.

In re Otto Electrical Manufacturing Co. (1905) Limited, [1906] 2 Ch. 390, followed.

The charter having provided for three directors only, six could not be legally elected; and, the company having assumed to elect six directors, they must be considered to have acted under that election, and not by virtue of three of them being directors under the charter; there never was a valid board of directors elected, the charter directors never assumed to act, and no valid allotment was ever made of any shares.

Garden Gully United Quartz Mining Co. v. McLister (1875), 1 App. Cas. 39, 50, 53, followed.

The enactments contained in Part VIII. (secs. 110-115) are for the protection of shareholders, and in the above respect and in other respects were not complied with.

APPEAL by D. Hamilton and four others from the report of an Official Referee, in a winding-up proceeding under the Winding-up Act, R.S.C. 1906, ch. 144, in regard to the placing of the names of the appellants on the list of contributories.

January 31 and February 1. The appeal was heard by CLUTE, J., in the Weekly Court at Toronto.

K. F. Mackenzie, for the appellants.

J. A. Macintosh, for the liquidator, respondent.

February 10. CLUTE, J.:—Motion by way of appeal from the report of J. A. C. Cameron, Esquire, an Official Referee, dated the 23rd November, 1915, and filed on the 8th December, 1915, placing the names of D. Hamilton, George Kneen, J. D. Martineau, Joseph Mongeau, and J. Stetson, on the list of contributories in the liquidation of Carpenter Limited, and for an order striking off the same from the list of contributories; upon

the following, amongst other grounds, namely: (1) that the Ontario Companies Act, 2 Geo. V. ch. 31, Part VIII. (now R.S. 1914, ch. 178, Part VIII.) had not been complied with by the company in question; that the restrictions on allotment (sec. 110, sub-secs. (1), (3), and (4)) not having been complied with by the company in question, sec. 111, sub-sec. (1), applied, and the contributories were entitled to avoid and did avoid their subscriptions; (2) that the company was never entitled to commence business because the provisions (a), (b), and (c) of sec. 112, sub-sec. (1), had not been complied with, and no certificate from the Provincial Secretary, as required by sub-sec. (2), was ever obtained, and that any contract made by the company before the date at which it was entitled to commence business is provisional under sub-sec. (3), and consequently there can be no creditors of the company; (3) that the learned Referee has made no findings upon the evidence of misrepresentations inducing the subscriptions, and that after his decision he refused to open the matter to allow further conclusive evidence upon this point; (4) that the company was never organised, no board of directors was ever constituted, and there was no preference stock to issue, and no allotment thereof; (5) that there could be no allotment under the terms of the prospectus, which provided that the stock should be allotted when fully paid-up; (6) that the learned Referee erred in holding that shares were allotted to these contributories; (7) that the findings of the learned Referee were contrary to the law and evidence and weight of evidence.

In order to appreciate the bearing of these objections, having regard to what was done by the company after its incorporation and the effect of the statute relied on, it will be necessary to refer to the facts, the more important of which are really not in controversy.

The company was incorporated on the 18th February, 1913, by Ontario letters patent, to carry on a general canning business; the capital of the company to be \$100,000, divided into 1,000 shares of \$100 each, of which 500 shares were preferred shares. The shareholders named in the charter were Arthur Clarence Pratt, Robert Ferrier Macfarlane, Thomas Henry Pettit Carpenter, Charles Drysdale Carpenter, Robert Alexander Macfarlane, and Andrew Elsdon Carpenter. The provisional directors

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were Arthur Clarence Pratt, Robert Alexander Macfarlane, and Thomas Henry Pettit Carpenter. The charter is issued subject to the provisions of Part VII. of the Ontario Companies Act, which refers to "prospectus and directors' liability."

The record of what was done by the company after the issue of the patent is loose and unsatisfactory; as was said by counsel, the company appears to have gone on wholly oblivious of the requirements of Part VIII. of the Act. There was no regular minute-book kept, and the minute, such as it is, was not made by the secretary, but was made by the solicitor on loose sheets, and signed by the president and secretary and fastened in a book called a minute-book. The first entry is a notice of the first general meeting as follows:—

"The first general meeting of the shareholders of the Carpenter Limited for the purpose of organisation of the company for the commencing of business and taking over all the contracts and properties set forth under an agreement dated the 1st day of March, 1913, and made between R. F. Macfarlane and Carpenter Limited, will be held at the company's office at Winona, on Saturday the 1st day of March, 1913, at the hour of seven o'clock in the afternoon.

"By order.

"Robert A. Macfarlane,

"Thomas H. P. Carpenter,

"Arthur C. Pratt,

"Provisional Directors."

The names of the provisional directors are typewritten.

Then follows a power of attorney, dated the 1st day of March, 1913, in which Arthur C. Pratt and R. A. Macfarlane appoint T. H. P. Carpenter to be their proxy to vote on their behalf at the meeting of the shareholders of the said company *to be held at Winona on the 1st March, 1913, or at any adjournment of the said meeting.* No meeting was held on the 1st March.

The next entry is called a waiver of notice of directors' meeting, and is as follows:—

"Know all men by these presents that each of the undersigned, being the provisional directors of the Carpenter Limited, have waived notice and by these presents do hereby waive notice of the provisional directors' meeting and meeting of directors of the said

company on the 17th day of March, 1913, I hereby ratifying and confirming anything that may be done at said meeting.

"Dated at Winona the 17th day of March, 1913.

"T. H. P. Carpenter,

"A. C. Pratt,

"R. Macfarlane,

"C. D. Carpenter,

"R. A. Macfarlane."

Witness.

(name unreadable).

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The provisional directors were in number three only.

That is followed by the minutes of a meeting of the directors on the same day, in which it is stated: "All the provincial (*sic*) directors being present except R. F. Macfarlane and A. C. Pratt, who waived notice of the meeting." At this meeting of the directors it was decided to call a general meeting of the shareholders of the company for the same day.

The minutes of the meeting of shareholders recite that, pursuant to a call of the "provincial" (*sic*) directors, all the shareholders of the company were present in person or by proxy, giving the names as: T. H. P. Carpenter, one share; C. D. Carpenter, one share; A. E. Carpenter, one share; R. A. Macfarlane, one share; R. F. Macfarlane, one share by proxy; A. C. Pratt, one share by proxy.

The evidence shews that no proxy was given for R. F. Macfarlane and A. C. Pratt except the one for the meeting to be held on the 1st March, 1913, or at any adjournment thereof, and that no meeting was held on that day, and it is contended that this meeting of the shareholders was wholly illegal, because it was held without due notice, and all the shareholders were not present. This meeting purported to elect a board of six directors, which included at that time all the shareholders. There was no authority to elect six directors at this time, and no other directors were ever elected, and it is contended that all acts purporting to be done by these directors are wholly void, for that it cannot be claimed that, even if the charter directors were present, they acted by virtue of their original authority, nor had they authority otherwise to act, they not having been duly elected: *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39. It was at a meeting of these directors that they purported to allot and to issue to R. A. Macfarlane \$50,000 "fully paid-up common

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stock of the said company in payment of his interest in certain contracts for the purchase of certain fruits and vegetables required by the said company, as authorised by the shareholders at a general meeting held at the head office of the company on Monday the 17th day of March, 1913" (the same day). The contestants urge that, notwithstanding this resolution disposing of the \$50,000 of common stock, the president, in obtaining their subscriptions, represented to them that the whole \$50,000 of common stock still remained in the treasury. In this resolution it is treated as fully paid-up. The answer which counsel for the liquidator makes to this charge is, that this transfer was merely a blind to enable the company to dispose of the common stock at less than its face value by treating it as paid-up stock; and, although the resolution speaks of an absolute transfer, it was understood, notwithstanding, that R. A. Macfarlane held the stock as fully paid-up in trust for the company.

What purports to be a further minute of the directors' meeting of the 17th March, 1913, shews that, the same directors being present, a draft of the proposed by-laws was submitted, a seal for the company was adopted, and a by-law number 50, "being a by-law to create and issue fifty thousand dollars as preference stock under the charter; be and the same is hereby approved and adopted." The directors further approved of the sale of \$50,000 of stock to Macfarlane for certain options and agreements not particularised, "and that the issue of fifty thousand dollars worth of shares of the stock of this company fully paid-up and non-assessable is hereby directed to the said Macfarlane." It was further directed that the *stock-book* of the company be *opened for subscriptions*, and that a *manager be appointed to go on with the erection of buildings and purchase of machinery and erection of the factory "and to do all things necessary to get the company into first class running order;"* that is before any stock had been sold.

At an adjourned meeting of the shareholders held on the same day (17th March), by-law 50, to create \$50,000 preference stock, was confirmed and adopted, and the resolution of the directors taking over the agreements and options from Macfarlane was approved and ratified, and the transfer of \$50,000 of shares of the stock of the company, as consideration for the transfer of the said agreements and options, was approved, ratified, and confirmed.

A further meeting of the directors was held on the 2nd June. The secretary "presented applications for stock from the following parties, viz.: J. D. Martineau, Montreal, 5 shares; Geo. V. Kneen, Montreal, 5 shares;" and it was moved and seconded "that the amount of stock subscribed for by the said parties be allotted to them and that notice of such allotment be posted to the said parties forthwith."

On the 1st August, there was a further meeting of the directors, in which the vacancy created by the retirement of A. C. Pratt was filled by the appointment of J. C. Christie as director.

A further meeting of the directors was held on the 27th September, when it was moved and seconded that "notice of allotment of stock be mailed to the following parties for the amount of stock subscribed;" then followed the names of a number of persons, not including any of the above alleged contributories.

The next and last meeting of the directors was on the 8th October, 1913, when it was resolved to have the company wound up on account of financial difficulties.

The by-laws purport to be enacted by the directors on the 17th March, 1913, and to be adopted and passed by the shareholders on the same day.

The directors took subscriptions for stock, received payments thereon, bought and paid for real estate, erected buildings thereon, and the company had just commenced its canning operations when it became financially embarrassed; and, upon the application of the Long Lumber Company Limited, claiming to be a creditor to the extent of \$2,800, a winding-up order was made on the 17th October, 1913.

The learned Referee finds that contributory number 11, D. Hamilton, signed his subscription for five shares on the 23rd May, 1913. The minute-book does not shew any allotment; the stock-ledger shews Hamilton as a shareholder for five shares, and he is credited with two payments, one on the 16th June of \$100, and the other on the 16th July of \$100, and the evidence shews that he made another payment of \$100; so that in any event he is liable for only \$200.

Re contributory number 16, George Kneen. Mr. Kneen signed his subscription for five shares on the 15th May; these shares were allotted to Mr. Kneen on the 2nd June, 1913, as

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appears by the minute-book of the company. The stock-register shews Mr. Kneen as a shareholder with nothing paid.

Re contributory number 21, J. D. Martineau. Mr. Martineau signed his subscription for five shares on the 15th May, 1913; these shares were allotted on the 2nd June, 1913, as appears by the minute-book of the company. The stock-register shews Mr. Martineau as a shareholder with nothing paid.

Re contributory number 22, Joseph Mongeau. Mongeau and Frere signed a subscription for five shares on the 29th May, 1913; the minute-book of the company does not shew any allotment; Joseph Mongeau is the sole partner of Mongeau and Frere. The stock-register shews Mongeau and Frere as shareholders for five shares with nothing paid. He in fact paid \$100.

Re contributory number 30, J. Stetson. Stetson subscribed for five shares of the preference stock on the 1st May, 1913; the minute-book shews no allotment. The stock-register shews Stetson to be a shareholder for five shares. He paid on account on the 11th June, 1913, \$100, and on the 16th June, 1913, \$100; he is entitled to be credited for payment of another \$100 which does not appear in the minute-books of the company. If this contributory is liable, he is liable only for \$200.

The learned Referee finds: (1) that the present alleged contributories subscribed for the amount of stock for which they are charged; (2) that they received notice of allotment; and he further holds that, in the cases of Stetson, Mongeau, and Hamilton, formal notice of allotment was not necessary, on account of the payments made by them and received by the company: see *Re Canadian Tin Plate Decorating Co.* (1906), 12 O.L.R. 594; *Re Standard Fire Insurance Co.* (1885), 12 A.R. 486; *Hill's Case* (1905), 10 O.L.R. 501; *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481.

On the question of misrepresentation he holds that this is no defence, and it is not necessary to consider the facts on which the alleged contributories rely in proof of the same, for, even if the misrepresentation on which they rely were admitted, it would not relieve them from liability: *Oakes v. Turquand* (1867), L.R. 2 H.L. 325, 342.

The learned Referee held that the statute afforded no defence to the contestants, and ordered them to be placed on the list of contributories.

The statute 2 Geo. V. ch. 31, under which this company received its charter, contains provisions first appearing in the English Companies Act of 1900, and continued in the English Companies Act of 1908. The sections particularly referred to appear in Part VIII. of the Ontario Companies Act, secs. 110 to 115 inclusive.

Section 110 (1) provides that "no allotment shall be made of any share capital offered to the public for subscription unless;

"(a) The amount, if any, named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or,

"(b) If no amount is so named, the whole amount of the share capital so offered for subscription

"has been subscribed, and the sum payable on application for the amount so named, or for the whole amount offered for subscription, has been paid to and received by the company."

No amount in the prospectus is mentioned as the minimum, so that the sum payable on application for the whole amount of the share capital is required to be paid in before allotment shall be made, which, under sub-sec. (3), shall not be less than five per cent. of the nominal amount of the share. In the present case it is fixed by the prospectus as twenty per cent.

"Any condition" (sub-sec. (6)) "requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void."

By sub-sec. (7) it is provided that "this section" (110), "except sub-section (3), shall not apply to any allotment of shares subsequent to the first allotment offered by a public company."

The prospectus states that stock is offered at par, payable twenty per cent. with the application and twenty per cent. every thirty days thereafter until fully paid, when stock will be allotted; "the right is reserved to allot such subscription and such amounts as may be approved."

It will be noticed that sub-sec. (3) is excepted from sub-sec. (7). Sub-section (3) requires that "the amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share." It is not disputed that in respect of a number of the applications no amount whatever was paid.

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Sub-section (4) provides that if such conditions have not been complied with on the expiration of ninety days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and if any such money is not so repaid within one hundred days after the issue of prospectus, the directors shall be jointly and severally liable to repay the same, unless a director proves that the loss was not due to any misconduct or negligence on his part.

Section 111 provides (sub-sec. (1)) that "an allotment made by a company to an applicant in contravention of the foregoing provisions of this Part shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company, and not later, and shall be so voidable notwithstanding that the company is in the course of being wound up." "Statutory meeting," as used in this section, is defined by sec. 115 (sub-sec. (1)): "Every company shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of its shareholders, which shall be called the statutory meeting." This statutory meeting has never been held. It could not be held until the company was entitled to commence business, and the company was never entitled to commence business, owing to the requirements of the statute, sec. 112, not having been complied with. That section provides (sub-sec. (1)) :—

"A company shall not commence any business or exercise any borrowing powers unless:

"(a) Shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and,

"(b) Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered by a public company; and,

"(c) There has been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors in the prescribed form, that such conditions have been complied with

and the Provincial Secretary has certified as provided by sub-section (2)."

No such statutory declaration has been filed, and no certificate obtained.

Sub-section (2) of sec. 12 provides for the certificate of the company's right to commence business; and sub-sec. (3) declares that "any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding."

Sub-section (5): "If any company commences business or exercises borrowing powers in contravention of this section every person who is responsible for the contravention shall, without prejudice to any other liability, incur a penalty not exceeding \$50 for every day during which the contravention continues."

To shew the peremptory nature of the above requirements, reference may be made to sub-sec. (6).

Section 113 provides that "all sums received by the company or by any promoter, director, officer or agent thereof shall be held in trust . . . until deposited in a chartered bank to the credit of the company and shall be so deposited and there remain in trust until the issue of the certificate by the Provincial Secretary." There is no pretence that the money so paid in was so deposited. The money in fact was used in the business of the company, which was carried on without having obtained the certificate and without authority.

Section 114 is as follows:—

"(1) Where a company makes any allotment of its shares it shall, within two months thereafter, file with the Provincial Secretary:

"(a) A return of the allotments, stating the number and nominal amount of the shares comprised in each allotment, the names, addresses and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; and

"(b) In the case of shares allotted in whole or in part for a consideration other than cash, a contract in writing constituting the title of the allottee to such allotment, together with any contract of sale, or for services or other consideration in respect of which such allotment was made and a return stating the number

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and nominal amount of shares so allotted, the extent to which they are to be treated as paid-up, and the consideration for which they have been allotted."

These provisions were not complied with either in respect of the preferred shares or of the common stock, the whole of which, amounting to \$50,000, purport to be transferred to Macfarlane for indefinite, and, so far as I can see, nominal, consideration.

Sub-section (2) of sec. 114 provides that if default is made in compliance with the requirements of this section every officer of the company who is knowingly a party to the default shall incur a penalty not exceeding \$50 for every day during which the default continues.

Section 115, above referred to, provides for statutory meetings, the notice of which is provided for by sec. 42, which declares that, in default of other express provision in the special Act or letters patent or by-laws of the company, notice of the time and place for holding general meetings of every company, including the statutory meeting and the annual and special meetings, shall be given at least ten days previously by registered letter to each shareholder at his last known address, and by an advertisement in a newspaper published at or as near as may be to the place where the company has its head office and to the chief place of business of the company.

Sub-section (2) of sec. 115 provides that the directors shall, at least ten days before the day on which the meeting is to be held, send to every shareholder a report, certified by not less than two directors, stating: (a) the total number of shares allotted, distinguishing the shares allotted as fully or partly paid-up; (b) the total amount of cash received; (c) an abstract of receipts and payments, etc.; (d) names, addresses and descriptions of directors; and (e) the particulars of contracts; the report is to be certified by auditors (sub-sec. (3)), and to be filed with the Provincial Secretary (sub-sec. (4)). Sub-section (8): "If default is made in filing such report or in holding the statutory meeting, then at the expiration of fourteen days after the last day on which the meeting ought to have been held any shareholder may apply to the Court for the winding-up of the company," etc.

A contract with the company is usually made by an application by the intending shareholder for so many shares, and upon an allotment being made and notified to him a binding contract

is complete when the acceptance is notified to the applicant: *Nicol's Case* (1885), 29 Ch. D. 421, 426 (C.A.); *Hebb's Case* (1867), L.R. 4 Eq. 9.

The acceptance is notified when the notice is posted, even though it never reaches the applicant: *Halsbury's Laws of England*, vol. 5, p. 173. In the case of a conditional offer, if the condition is subsequent there is a binding agreement to take shares as soon as the company notifies its acceptance of the offer. Where the condition is a condition precedent, there is no binding agreement to take the shares until the condition is either fulfilled or waived: *Elkington's Case* (1867), L.R. 2 Ch. 511; *Pellatt's Case* (1867), *ib.* 527; *Halsbury's Laws of England*, vol. 5, p. 173, para. 289; see also p. 177, para. 294, referring to the English Act, where it is said that "in the case of the first allotment of shares offered to the public for subscription, no allotment must be made of any share capital of a company offered to the public for subscription, unless (1) the minimum subscription, if any, or if not, the whole amount of share capital offered for subscription, has been subscribed; and (2) the sum payable on application for the minimum subscription, or such whole amount, as the case may be, has been paid to and received by the company;" referring to sec. 85 of the Imperial Act, corresponding to sec. 110 of our Act.

The minimum subscription is the amount named in the prospectus, and if no such amount is fixed then the whole amount must be reckoned, exclusively of any amount payable otherwise than in cash. It is further pointed out in this section that the amount payable on application on each share must be actually paid to and received by the company. See also *Palmer's Company Law*, 9th ed., p. 105, where this and the following sections are considered.

I take the meaning of sub-sec. (7) of sec. 110 to be this: that it has relation to sub-sec. (1) (a) of sec. 110, where the prospectus names a minimum subscription upon which the directors may proceed to allotment, and where they have proceeded to allotment, having named the minimum of shares upon payment of five per cent. or more of which the company may commence business, this section, 110, does not apply, except sub-sec. (3). With regard to the application of sec. 110, the learned author of *Palmer's Company Law*, p. 106, says: "As to companies which invite the

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public to subscribe for shares, sub-secs. (1) to (6) inclusive apply."

Sub-section (6) of sec. 85 of the English Act corresponds to sub-sec. (7) of sec. 110 of our Act.

The company in this case by its prospectus does invite the public by offering stock to the public at par.

The learned author further points out (p. 107), as to the minimum subscription, that the amount may be stated as so many shares, or so many pounds, or as a specified percentage of what is offered for subscription. The statement must be express: *Roussell v. Burnham*, [1909] 1 Ch. 127. In that case the applicant saw the prospectus, read it, and, in consequence of the statements contained in it, cut the form out of a newspaper and filled it up and sent it to the company, applying for 700 ordinary shares. These were allotted to him on the 27th November, and he paid £175. The remaining 15 shillings per share had been called up, but the plaintiff declined to pay, pending the hearing of his action. This was on the 26th November, 1906. On the 9th December, 1906, he wrote to the company repudiating the allotment and asking for the return of his money. The company refused, and brought action. The ground upon which the cancellation was sought was that the prospectus contained no statement of the minimum subscription upon which the directors could proceed to allotment, as required by sec. 4, sub-secs. (1) and (4), of the Companies Act, 1900 (corresponding to sec. 110 of our Act, 2 Geo. V. ch. 31). It will be seen that in that case subscription had been made, money paid, and what purported to be an allotment was also made. Parker, J. (p. 130), points out that it is made unlawful for a company, in cases to which the section applies, to proceed to allotment of any share capital of the company offered to the public for subscription unless certain conditions are fulfilled—that is to say, unless either the whole amount of the capital offered is subscribed, or the memorandum or articles of association of the company fix the minimum amount upon which the directors are authorised to proceed to allotment, and that minimum amount is stated in the prospectus and is in fact subscribed. If any allotment be made to an applicant for shares contrary to the provisions of sec. 4, certain results are to follow, these results being specified in sub-sections corresponding to sub-secs. (4) and (6) (sec. 110) of our Act. He then refers to sec. 5, corresponding

to sec. 111 of our Act. He further held (p. 133) that the statement which the Legislature contemplated as to the minimum subscription upon which the allotment might proceed, was an express statement, and not one which can be implied or inferred from other statements in the prospectus. As the whole amount of the capital offered was not subscribed, and there was no authorised minimum, the plaintiff's application for shares was cancelled.

Under the English Act it was held that if the company is one to which the statutory meeting section does not apply, that is, a company formed before the 1st January, 1901, there is no limit on the shareholder's right to rescind, short of his affirming the contract: *Finance and Issue Limited v. Canadian Produce Corporation Limited*, [1905] 1 Ch. 37. It is not necessary that the rescinding shareholder should take actual legal proceedings to avoid the contract within the month; notice of avoidance, followed by prompt legal proceedings, is enough; and, *semble*, the notice need not specify the ground of avoidance: *In re National Motor Mail-Coach Co. Limited*, [1908] 2 Ch. 228. That allotment, if once made, though irregularly, *is only avoidable at the option of the shareholder*. The company cannot insist on paying back the application-moneys, for the shareholder may prefer to keep the shares: *Burton v. Bevan*, [1908] 2 Ch. 240.

The result at which I have arrived, having regard to the statute and the particular facts of this case, may be shortly stated thus:—

The charter having provided for three directors only, six directors could not be legally elected; and, the company having assumed to elect six directors, they are presumed to have acted under that election, and not by virtue of their being directors under the charter, and, as pointed out in the judgment in *Garden Gully United Quartz Mining Co. v. McLister*, 1 App. Cas. at p. 50, it was not the old board who assumed to act, but the new board of directors as elected, and the new board, as such board, assumed to act, others than the original board being present. I would say, in the language of Mr. Justice Molesworth, approved by their Lordships of the Privy Council, that those, if any, who legally held office before that election, taking as under the election, could not be deemed to act under their former title: see p. 53.

But it is said that the proceedings toward election of directors, if entirely void, left the charter directors still in office under sec. 87

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of the Act. The answer to that position seems to me clear: first, at the meeting in question the original board were not present, either in person or by proxy; and, secondly, that board never assumed to act; even if they were all present, it was not their act, but it was the act of them with the other members, so that in fact there never was a valid board of directors elected, and the charter directors never assumed to act, and no valid allotment was ever made of any shares.

These enactments, as above pointed out, are for the protection of the shareholders; and if, in a case of this kind, they may be held liable for their shares, the statute would appear to me to be of no effect. The creditors have no just cause to complain; they could have easily ascertained that the company was not authorised to commence business, and they are presumed to have known that any contract made by a company before the date at which it is entitled to commence business is provisional only, and shall not be binding upon the company until that date: sec. 112, sub-sec. (3).

These provisions have been held to apply so as to prevent the recovery even in winding-up proceedings: *In re Otto Electrical Manufacturing Co. (1905) Limited*, [1906] 2 Ch. 390, where it was held that the word "provisional" means that the contract is to be read as if it contained a provision that it should not be binding upon the company unless and until the company became entitled to commence business. It was there held that the section applies to all contracts of a company, whether preliminary or final, or in the course of carrying on its business. Where, therefore, the company had gone into liquidation without having become entitled to commence business, a claim by a person resting on certain alleged contracts with the company, one part of the claim being for moneys paid for furnishing temporary offices for the company, was disallowed. See also *New Druce-Portland Co. Limited v. Blakiston* (1908), 24 Times L.R. 583.

It seems to me absurd to say that, having regard to sub-sec. (4) of sec. 110, which provides for repayment where the conditions are not complied with, the stockholder can nevertheless be called upon to pay the balance of his shares, when he is entitled to have returned to him the portion that he has already paid. Here, no statutory meeting having been held, the fact of the company

being wound-up does not affect the applicants' right. Their claim to have their applications for shares cancelled is within time.

It is unnecessary for me to decide whether there are any valid creditors or not, or to consider the question of misrepresentation and other questions raised by the applicants. I dispose of this case upon the broad ground that the company has never complied with the requirements of the statute, and that those persons who became subscribers are entitled, notwithstanding the winding-up proceedings, to make claim to have their subscriptions for stock cancelled and to be removed from the list of contributories.

The appeal should be allowed, and the order of the Referee placing the contestants upon the list of contributories set aside, and an order made declaring that their applications for stock are cancelled, and that their names be removed from the books of the company as stockholders or as subscribers for stock.

The applicants should have their costs of appeal and of the proceedings incident to having their names removed from the list of contributories.

[Leave to appeal from the above decision was refused by SUTHERLAND, J., on the 27th March, 1916: see 10 O.W.N. 122.]

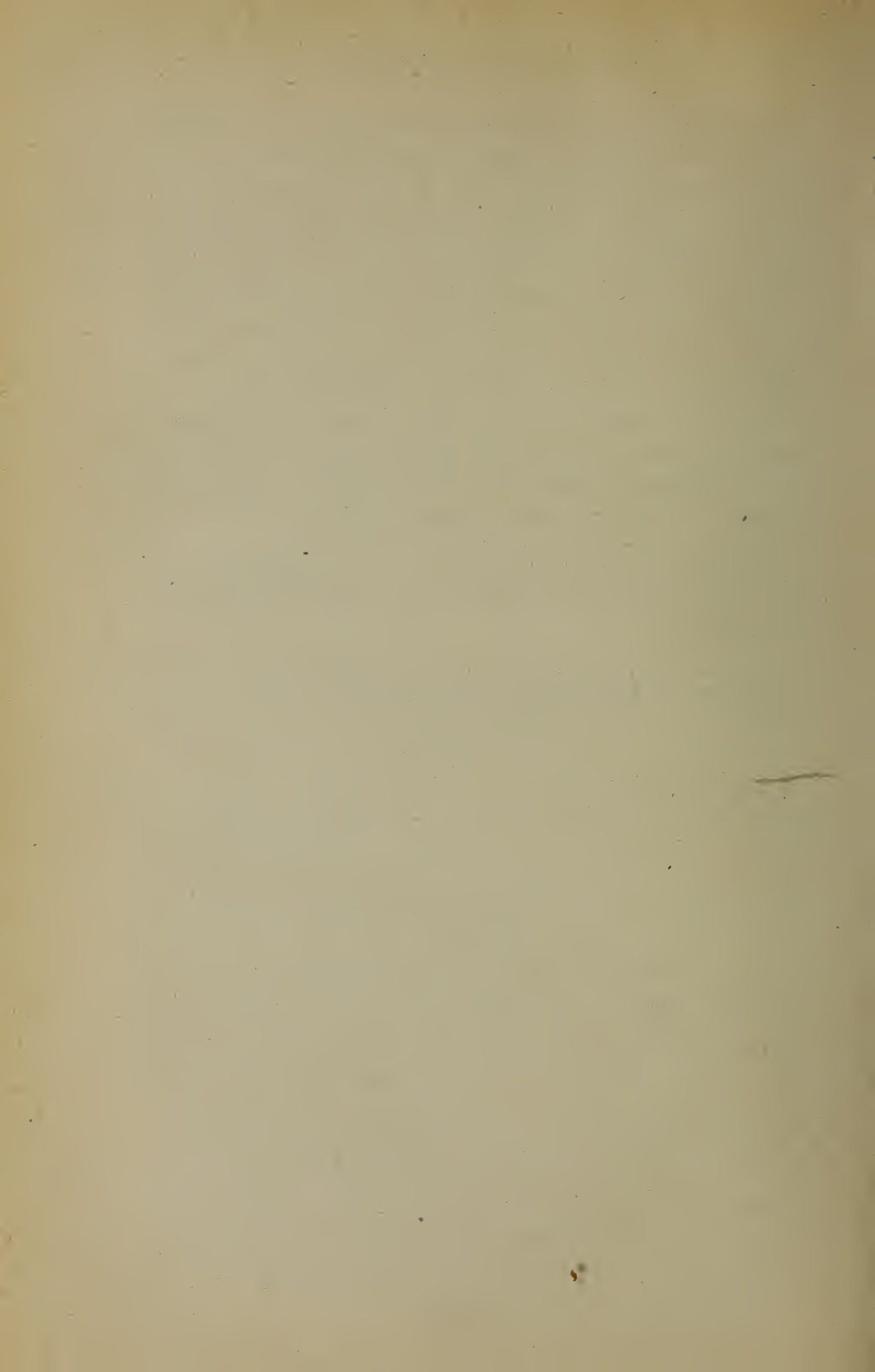
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APPENDIX I.

SUPREME COURT OF ONTARIO.

RULE PASSED 7TH APRIL, 1916.

Rule 773 (d).—That the Rules be amended as follows:

(1) Rule 106, line four, substitute the word “served” for the word “sued.”

(2) Rule 112 (3), strike out the words “and notice of trial may be at once served.”

(3) Rule 119, strike out the words “other than a joinder of issue.”

(4) Amend Rule 204 by substituting the word “one” for “2” in line two thereof.

(5) Rule 360, line seven, substitute 362 for 369.

(6) Form 43, substitute “ten” for “fourteen.”

(7) Form 63, strike out.

(8) Form 69, strike out clause 5.

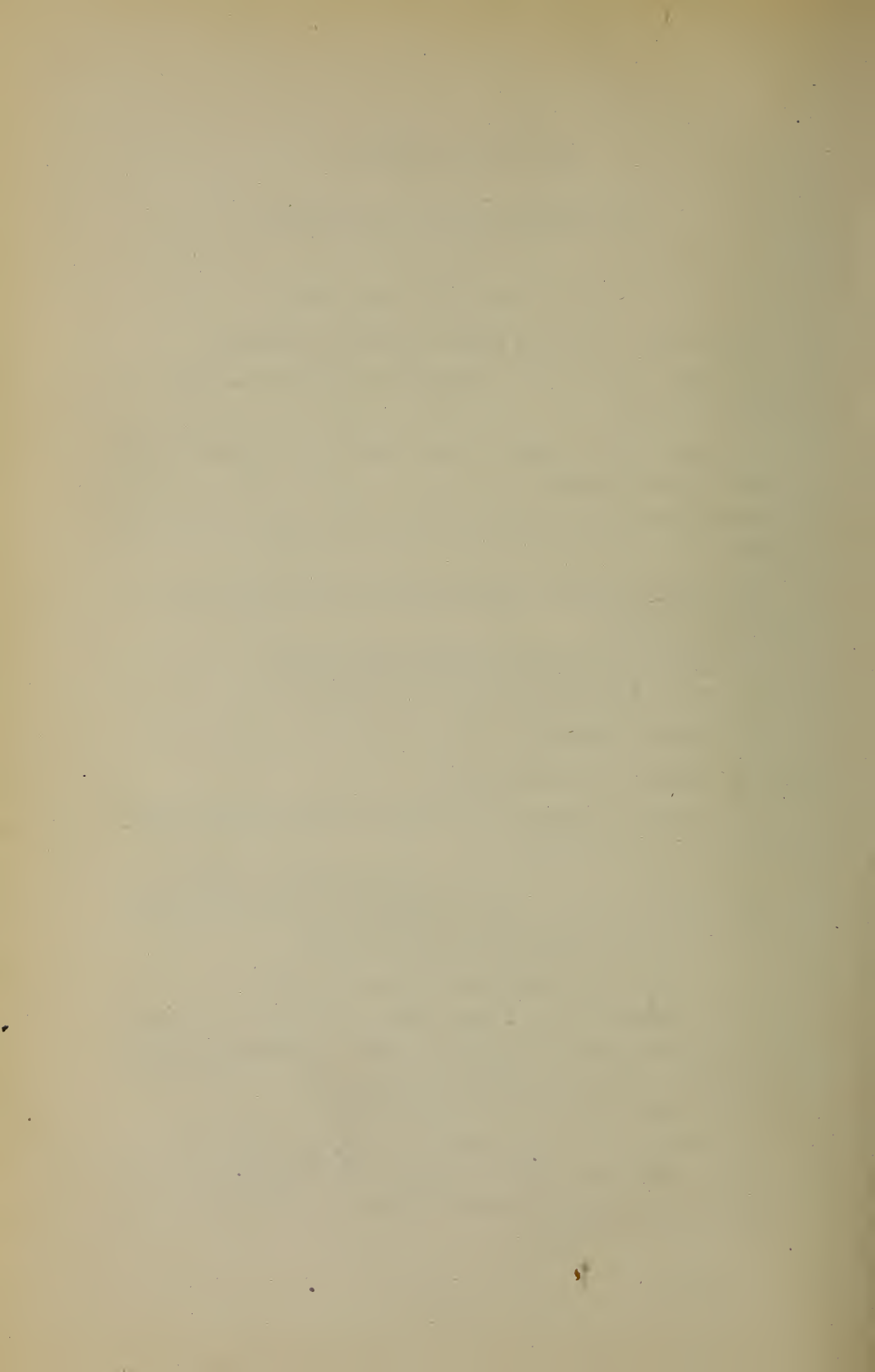
(9) Amend the number of the Rule 66 (2) passed 24th December, 1913, so as to read 661 (2).

(10) Amend the place where the amendment of the C. C. tariff of 26th February, 1914, was directed to be inserted so that it shall immediately follow item 24 on page 208.

(11) Amend item 25 in Tariff “A” so as to read:

“On application to the Taxing Officer at Toronto for increased fees and upon the taxation of the costs of abandoned motions and appeals, or upon taxations where an action is discontinued or money paid into Court is accepted, \$5.00.”

(12) Number the Rule passed 1st December, 1913, 773 (a), and the Rule passed 24th December, 1913 (commencing “The Tariff” and ending “evidence”) 773 (b), and the Rule of 26th February, 1914, 773 (c).



APPENDIX II.

Ontario Cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of volume 34 of the Ontario Law Reports:—

COOK v. DEEKS, 33 O.L.R. 209, reversed by the Judicial Committee of the Privy Council: COOK v. DEEKS, [1916] A.C. 554.

HOLDITCH AND CANADIAN NORTHERN ONTARIO R.W. Co., *Re*, decision of the Second Divisional Court of the Appellate Division, 23rd September, 1913, unreported, reversed by the Supreme Court of Canada: CANADIAN NORTHERN ONTARIO R.W. Co. v. HOLDITCH, 50 S.C.R. 265; and the reversing judgment affirmed by the Judicial Committee of the Privy Council: HOLDITCH v. CANADIAN NORTHERN ONTARIO R.W. Co., [1916] A.C. 536.

KOHLER v. THOROLD NATURAL GAS Co., 6 O.W.N. 67, reversed by the Supreme Court of Canada: KOHLER v. THOROLD NATURAL GAS Co., 52 S.C.R. 514.

OTTAWA AND NEW YORK R.W. Co. AND TOWNSHIP OF CORNWALL, *Re*, 34 O.L.R. 55, affirmed by the Supreme Court of Canada: TOWNSHIP OF CORNWALL v. OTTAWA AND NEW YORK R.W. Co., 52 S.C.R. 466.

RUNDLE, *Re*, 32 O.L.R. 312, affirmed by the Supreme Court of Canada: TRUSTS AND GUARANTEE Co. v. RUNDLE, *In re* RUNDLE, 52 S.C.R. 114.

SINGER, *Re*, 33 O.L.R. 602, affirmed by the Supreme Court of Canada: SINGER v. SINGER, 52 S.C.R. 447.

SNIDER v. CARLETON, CENTRAL TRUST AND SAFE DEPOSIT Co. v. SNIDER, 35 O.L.R. 246, reversed by the Judicial Committee of the Privy Council: CENTRAL TRUST AND SAFE DEPOSIT Co. v. SNIDER, [1916] A.C. 266, 35 O.L.R. at p. 258.

STAMFORD, TOWNSHIP OF, v. ONTARIO POWER Co. OF NIAGARA FALLS, 8 O.W.N. 241, affirmed by the Judicial Committee of the Privy Council: ONTARIO POWER Co. OF NIAGARA FALLS v. STAMFORD CORPORATION, [1916] A.C. 529.

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gan Central R.R. Co.* (1909), 19
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A.C. 1083, that, in determining the compensation to be paid to the owner, the value of the land must be taken to consist in all advantages which it possesses, present or future, in so far as the possession of them enhances the value of the land, is applicable in ascertaining the "actual value" of the land for the purpose of assessment, subject to the qualification that it may be that in expropriation proceedings the fact that the land is taken without the consent of the owner may be considered; *HODGINS, J.A.*, not agreeing in the opinion of the majority of the Court on this point.—The assessor and the Ontario Railway and Municipal Board rightly took into consideration the enhanced value which a part of the applicant-company's lands had by reason of its adaptability for the use to which it had been put and by reason of its having been put to that use; and an application for leave to appeal from the decision of the Board confirming the assessment was refused.—The question of the amount by which the value of the land had been enhanced was a question of fact and not of law, and as to that no appeal lay.—*Re Bruce Mines Limited and Town of Bruce Mines* (1910), 20 O.L.R. 315, and *Re Coniagas Mines Limited and Town of Cobalt* (1910), 20 O.L.R. 322, followed. *Re Ontario and Minnesota Power Co. Limited and Town of Fort Frances*, 459.

2. *Tax Sale—Assessment Act, 1904, 4 Edw. VII. ch. 23(O.)—Clerk's Return—Assessor's Return*

— *Basis for Sale — Unoccupied Land*—Sec. 122—*Advertising—Time of Sale*—Sec. 144—*Inadequacy of Price—Sale Openly and Fairly Conducted—Duty of Treasurer to Inquire as to Value of Land*—Sec. 142—*Notice to Redeem—Address of Owner not Furnished*—Sec. 165—*Curative Provisions—Effect of secs. 172, 173*—*Sale not Attacked within two Years — Period Computed from Date of Sale.*—In an action commenced on the 12th October, 1915, to set aside a sale made to the defendant on the 7th November, 1912, of the plaintiffs' land, for the unpaid taxes of 1909, and to set aside the deed executed on the 11th December, 1913, in pursuance of the sale, it was *held*:—(1) That the land was properly described as "not occupied" in the return of the Clerk in 1912, of lands liable to be sold; and the return, not being displaced by superior evidence, formed a sufficient basis for the sale of the land: sec. 122 of the Assessment Act, 4 Edw. VII. ch. 23 (O.).—(2) That the statute was substantially complied with in regard to advertising the sale, but sec. 144 was not literally followed.—(3) That in tax sales the Court does not interfere on the ground of inadequacy of price; and, apart from values, the sale was fairly and openly conducted; the law does not cast any duty on the municipal officer who sells to inquire into or form any opinion of the value of the land, before selling (sec. 142).—*Henry v. Burness* (1860), 8 Gr. 345, 350, 357, specially referred

to.—(4) That the plaintiffs, being non-resident and not having notified the Treasurer of an address to which notices might be sent, could not complain because a notice sent to them on the 10th November, 1913, that the land, if not redeemed in a month, would be conveyed to the purchaser (sec. 165), did not reach them.—(5) That, by force of sec. 172, notwithstanding any neglect, omission, or error, whether in respect of imposing the tax or in any subsequent proceeding prior to the deed, the right of action was barred.—(6) That the two years allowed by sec. 173 for bringing an action are to be computed from the day of sale, not from the date of the deed; and that section is applicable for the protection of the purchaser. *Donovan v. Hogan* (1888), 15 A.R. 432, distinguished by reason of a change in the wording of the statute. *Burrows v. Campbell* (1912), 23 O.W.R. 271, 4 O.W.N. 249, approved and followed. *Excelsior Mining Co. v. Lochead*, 154.

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Conveyance of Land in Trust to Raise Money, Complete Buildings, and Pay Creditors—Assignments and Preferences Act, sec. 9—Mortgage Made by Trustee—Recoupment of Advances by Trustee—Validity of Mortgage—Absence of Fraud.—A person carrying on a lumber business, and owning several parcels of vacant land, conveyed them to a solicitor, upon trust to complete certain houses in the course of erection upon three of the parcels, and for the purpose of borrowing upon the security of the land or otherwise, and selling the land and personal property and collecting the debts due to the grantor (the personal property and debts, however, not being conveyed or assigned), and there-out to pay the trustee's own remuneration and all preferential claims, and then pay the ordinary creditors of the grantor, with an ultimate trust in favour of the grantor. A recital in the deed spoke of the financial embarrassment of the grantor and an assignment of all her property to enable her debts to be paid in full:—*Held*, that the trust deed was not an assignment under sec. 9 of the Assignments and Preferences Act, R.S.O. 1914, ch. 134.—*Held*, also, that a mortgage of part of the land conveyed to the trustee, made by him in favour of the plaintiff, was to be regarded as made for the benefit of the trust estate—the moneys of the plaintiff going to recoup the trustee for ad-

vances made by him personally to the trust estate—and that the defendant company, the successor of the solicitor in the trust—no fraud or bad faith being shewn—failed in its attempt to impeach the validity of the mortgage. *Foster v. Trusts and Guarantee Co.*, 426.

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1. *Winding-up of Bank—Contributory—Double Liability—Bank Act, sec. 125—Shares Purchased for Infant—Contract—Ratification after Majority—Receipt of Dividends—Knowledge—Laches and Acquiescence.*—Paid-up shares of the capital stock in a bank were purchased by the father of C., an infant, and placed in her name. Dividends upon the shares were received from time to time, and, with other moneys, placed to the

credit of an account opened in her name in the bank. On the 20th January, 1908—she being still an infant—there was a balance to her credit, which was transferred to an account opened in her name in another bank, the original bank being in difficulties. In December, 1913, an order for the winding-up of the original bank was made, under the Dominion statute. For some years previously, a winding-up had been going on outside of the statute. Upon her account transferred to the other bank, C., in October, 1913, being then of full age, drew a cheque, which was paid by the bank. The money in the bank upon which she drew was, in part at least, made up of the dividends which had been credited to her account. She did not repudiate or disaffirm her contract in respect of the shares until, in the winding-up, the liquidator sought to make her a contributory for “double liability” under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29:—*Held*, that C. was, on the ground of laches and acquiescence, liable as a contributory in respect of the shares standing in her name.—*Per* MEREDITH, C.J.O., GARROW and MAGEE, J.J.A. (and RIDDELL, J., in the Court below), that there was a distinct affirmation or ratification of C.’s apparent position of shareholder, by the withdrawal of the money in the bank after she had attained her majority—money which she must have known represented the accumulated dividends upon the shares;

MACLAREN and HODGINS, J.J.A., *contra*. *Re Sovereign Bank of Canada, Clark’s Case*, 448.

2. *Winding-up of Bank—Delegation of Powers of Court to Referee—Winding-up Act, R.S.C. 1906, ch. 144, sec. 110—Intra Vires—Exercise of Powers—Settlement by Referee of List of Contributories, Subject to Appeal—Validity of Winding-up Order—Binding Effect—Right of Appeal—Contributory—“Shareholder”—Double Liability—Bank Act, R.S.C. 1906, ch. 29, sec. 125—Irregularities in Regard to Organization Meeting—Certificate of Treasury Board Improperly Obtained—Effect upon Position of Shareholder—Conduct—Estoppel—Bank Act, secs. 12, 13, 14, 15, 132, 157.]—Section 110 of the Winding-up Act, R.S.C. 1906, ch. 144, is *intra vires* of the Parliament of Canada.—By an order for the winding-up of the bank, containing the usual provisions, the Referee was authorised to settle the list of contributories, subject to appeal; and the powers conferred by sec. 110 were properly exercised.—*Re Clarke and Union Fire Insurance Co.* (1887-89), 14 O.R. 618, 16 A.R. 161, *Schoolbred v. Clarke, Re Union Fire Insurance Co.* (1890), 17 S.C.R. 265, followed.—A Judge of the Supreme Court of Ontario, sitting in appeal from the finding of the officer of the Court upon the reference as to the liability of an alleged contributory, has no power to review the winding-up order.—Upon appeal from the finding of the Referee enforcing*

against the appellant the "double liability" under sec. 125 of the Bank Act, R.S.C. 1906, ch. 29.—*Held*, that the appellant could not escape liability upon the ground of irregularities in regard to the organisation meeting, if any there were: secs. 12, 13, 14, 15 of the Bank Act.—The appellant could not—having acted and benefited as a shareholder—have redress, after the winding-up order, to the prejudice of creditors whose losses he and his business associates had been instrumental in bringing about.—Sections 132 and 157 of the Bank Act have no application to the improper obtaining of a certificate enabling a corporation to issue notes and carry on a banking business. *Re Farmers Bank of Canada, Lindsay's Case*, 470.

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BOND

Cancellation—Liability of Sureties—Right of Action.—An action brought by the former treasurer of a municipality and his sureties, upon a bond given by them to secure the due performance of the duties of the office, to compel the cancellation of the bond, after the treasurership had come to an end, the treasurer's accounts had been audited and the audit

adopted by the municipality, and after payment over by the old to the new treasurer, duly made accordingly, was dismissed with costs.—*Brooking v. Maudslay Son & Field* (1888), 38 Ch. D. 636, and *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536, referred to for the practice of Courts of equity in decreeing cancellation of valid instruments and making declaratory judgments. *Shewfelt v. Township of Kincardine*, 39, 344.

BONDS.

See CONTRACT, 3.

BONUS.

See MORTGAGE.

BRIDGE.

See HIGHWAY, 1.

BROKERS.

See CONTRACT, 2, 3.

BUILDING CONTRACT.

See MECHANICS' LIENS.

BY-LAWS.

See CONTRACT, 5—MUNICIPAL
CORPORATIONS.

CANCELLATION OF APPLICATIONS FOR SHARES.

See COMPANY, 3.

CANCELLATION OF BOND.

See BOND.

CANCELLATION OF CONTRACT.

See VENDOR AND PURCHASER.

CASES.

Adams v. McBeath (1897), 27 S.C.R. 13, considered and distinguished.]—See WILL, 2.

Allcard v. Skinner (1887), 36 Ch.D. 145, referred to.]—See DEED.

Attorney-General v. Tongue (1823), 12 Price 51, 60, 61, followed.]—See MUNICIPAL CORPORATIONS, 4.

Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, approved.]—See APPEAL.

Beddoe, In re, [1893] 1 Ch. 547, followed.]—See EXECUTORS AND ADMINISTRATORS, 1.

Bell v. Wright (1895), 24 S.C.R. 656, distinguished and commented on.]—See SOLICITOR.

Bell Telephone Co. and City of Hamilton, In re (1898), 25 A.R. 351, distinguished.]—See ASSESSMENT AND TAXES, 1.

Breithaupt v. Marr (1893), 20 A.R. 689, distinguished, and dictum of MACLENNAN, J.A., at p. 694, approved.]—See CREDITORS RELIEF ACT.

Brooking v. Maudslay Son & Field (1888), 38 Ch.D. 636, referred to.]—See BOND.

Brown v. Coleman Development Co. (1915), 34 O.L.R. 210, reversed.]—See STATUTE OF FRAUDS.

Bruce Mines Limited and Town of Bruce Mines, Re (1910), 20 O.L.R. 315, followed.]—See ASSESSMENT AND TAXES, 1.

Bruère, In re (1881), 17 Ch.D. 775, explained.]—See LUNATIC.

Bryant and Barningham's Contract, In re (1890), 44 Ch.D. 218, followed.]—See VENDOR AND PURCHASER.

Brymer v. Thompson (1915), 34 O.L.R. 194, 543, referred to.]—See LANDLORD AND TENANT, 3.

Burland v. Earle, [1902] A.C. 83, followed.]—See DISCOVERY.

Burrows v. Campbell (1912), 23 O.W.R. 271, 4 O.W.N. 249, approved and followed.]—See ASSESSMENT AND TAXES, 2.

Campbell v. Patterson (1893), 21 S.C.R. 645, specially referred to.]—See CHATTEL MORTGAGE.

Canadian Oil Companies v. McConnell, Re (1912), 27 O.L.R. 549, followed.]—See DIVISION COURTS, 2.

Canadian Westinghouse Co. v. Murray Shoe Co. (1914), 31 O.L.R. 11, followed.]—See CONTRACT, 4.

Cedar Rapids and Manufacturing Power Co. v. Lacoste, [1914] A.C. 569, applied.]—See ASSESSMENT AND TAXES, 1.

Clarke and Union Fire Insurance Co., Re (1887-89), 14 O.R. 618, 16 A.R. 161, followed.]—See BANKS AND BANKING, 2.

Coniagas Mines Limited and Town of Cobalt, Re (1910), 20 O.L.R. 322, followed.]—See ASSESSMENT AND TAXES, 1.

Cook v. Belshaw (1893), 23 O.R. 545, followed.]—See MECHANICS' LIENS, 2.

Coyle or Brown v. John Watson Limited, [1915] A.C. 1, followed.]—See INSURANCE.

Crowley v. Boving and Co. of Canada (1915), 33 O.L.R. 491, followed.]—See EVIDENCE.

Dick v. Yates (1881), 18 Ch.D. 76, approved.]—See COPYRIGHT.

Dolan v. Baker (1905), 10 O.L.R. 259, applied.]—See CONTRACT, 1.

Donovan v. Hogan (1888), 15 A.R. 432, distinguished.]—See ASSESSMENT AND TAXES, 2.

Doyle v. Kaufman (1877), 3 Q.B.D. 7, 340, followed.]—See WRIT OF SUMMONS.

East London Railway Joint Committee v. Greenwich Union Assessment Committee, [1913] 1 K.B. 612, applied.]—See ASSESSMENT AND TAXES, 1.

Eberle's Hotels and Restaurant Co. Limited v. Jonas (1887), 18 Q.B.D. 459, followed.]—See CONTRACT, 4.

Elliot's Case (1861), L. & C. 103, referred to.]—See CRIMINAL LAW, 2.

Empire Loan and Savings Co. v. McRae (1903), 5 O.L.R. 710, referred to.]—See MORTGAGE.

Enohin v. Wylie (1862), 10 H.L.C. 1, 13.]—See EXECUTORS AND ADMINISTRATORS, 2.

Etherington and Lancashire and Yorkshire Accident Insurance Co., In re, [1909] 1 K.B. 59, followed.]—See INSURANCE.

Foisy v. Lord (1911), 2 O.W.N. 1217, 3 O.W.N. 373, distinguished.]—See LIMITATION OF ACTIONS.

Fremoult v. Dedire (1718), 1 P. Wms. 429, explained and applied.]—See TRUSTS AND TRUSTEES.

Garden Gully United Quartz Mining Co. v. McLister (1875), 1 App. Cas. 39, followed.]—See COMPANY, 3.

Garnham's Conviction, Re (1915), 34 O.L.R. 545, reversed.]—See MUNICIPAL CORPORATIONS, 3.

Gearing v. Robinson (1900), 27 A.R. 364, specially referred to.]—See MECHANICS' LIENS, 3.

Glavin v. Rhode Island Hospital (1879), 34 Am. Reps. 675, 12 R.I. 411, specially referred to.]—See NEGLIGENCE, 3.

Goodison Thresher Co. v. Township of McNab (1908-10), 19 O.L.R. 188, 44 S.C.R. 187, distinguished.]—See HIGHWAY, 1.

Graham v. Commissioners for Queen Victoria Niagara Falls Park (1896), 28 O.R. 1, distinguished.]—See NEGLIGENCE, 2.

Great Central R.W. Co. v. Banbury Union, [1909] A.C. 78, applied.]—See ASSESSMENT AND TAXES, 1.

Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536, referred to.]—See BOND.

Hall v. Lees, [1904] 2 K.B. 602, specially referred to.]—See NEGLIGENCE.]

Halladay and City of Ottawa, Re (1907), 15 O.L.R. 65, distinguished.]—See MUNICIPAL CORPORATIONS, 1.

Hamlyn & Co. v. Wood & Co., [1891] 2 Q. B. 488, referred to.]—See LANDLORD AND TENANT, 3.

Harris v. Huntbach (1757), 1 Burr. 373, applied.]—See PROMISSORY NOTE.

Head v. Tattersall (1871), L.R. 7 Ex. 7, explained and applied.]—See SALE OF ANIMAL.

Henry v. Burness (1860), 8 Gr. 345, specially referred to.]—See ASSESSMENT AND TAXES, 2.

Hewett v. Barr, [1891] 1 Q.B. 98, followed.]—See WRIT OF SUMMONS.

Hillyer v. Governors of St. Bartholomew's Hospital, [1909] 2 K.B. 820, followed.]—See NEGLIGENCE, 3.

Hopper, In re (1897), 66 L.J. Ch. 569, explained.]—See LUNATIC.

Hoskins and Hawkey, In re (1877), 1 A.R. 379, specially referred to.]—See LANDLORD AND TENANT, 2.

Howard v. Miller, [1915] A.C. 318, explained and applied.]—See TRUSTS AND TRUSTEES.

Hughes v. Little (1886), 17 Q.B. 204, 18 Q.B.D. 32, specially referred to.]—See CHATTEL MORTGAGE.

Huguenin v. Baseley (1807), 14 Ves. 273, referred to.]—See DEED.

Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331, specially referred to.]—See RAILWAY.

Jones v. Just (1868), L.R. 3 Q.B. 197, followed.]—See SALE OF GOODS, 2.

Kennedy v. Haddow (1890), 19 O.R. 240, followed.]—See MECHANICS' LIENS, 2.

Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319, referred to.]—See MORTGAGE.

Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17, applied and followed.]—See STATUTE OF FRAUDS.

Langley v. Meir (1898), 25 A.R. 372, specially referred to.]—See LANDLORD AND TENANT, 2.

Lavere v. Smith's Falls Public Hospital (1915), 34 O.L.R. 216, reversed.]—See NEGLIGENCE, 3.

Linton v. Imperial Hotel Co. (1889), 16 A.R. 337, specially referred to.]—See LANDLORD AND TENANT, 2.

Lovell v. Lovell (1906), 11 O.L.R. 547, 13 O.L.R. 569, specially referred to.]—See HUSBAND AND WIFE.

Lumsden v. Spectator Printing Co. (1913), 29 O.L.R. 293, followed.]—See LIBEL.

McKinnon v. Doran (1915), 34 O.L.R. 403, affirmed.]—See CONTRACT, 3.

Mathieu, Re (1898), 29 O.R. 546, approved.]—See INFANT.

Mercer v. Graves (1872), L.R. 7 Q.B. 499, specially referred to.]—See SOLICITOR.

Mersey Docks Trustees v. Gibbs (1866), L.R. 1 H.L. 93, followed.]—See NEGLIGENCE, 3.

Mickleborough v. Strathy (1911), 23 O.L.R. 33, referred to.]—See LANDLORD AND TENANT, 1.

Miller v. Robertson (1904), 35 S.C.R. 80, followed.]—See LIMITATION OF ACTIONS.

Moody v. Canadian Bank of Commerce (1891), 14 P.R. 258, distinguished.]—See CONTRACT, 4.

Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor (1915), 34 O.L.R. 161, followed.]—See COMPANY, 1.

Murrell v. Goodyear (1860), 1 D. F. & J. 432, followed.]—See VENDOR AND PURCHASER.

Mutual Loan Fund Association v. Sudlow (1858), 5 C.B.N.S. 450, applied.]—See PROMISSORY NOTE.

Nash and McCracken, Re (1873), 33 U.C.R. 181, referred to.]—See CONTRACT, 5.

Ord, Ex p., In re Shields (1821), Jac. 94, followed.]—See LUNATIC.

O'Rourke v. Commissioner for Railways (1890), 15 App. Cas. 371, applied.]—See EVIDENCE.

Orr v. Robertson (1915), 34 O.L.R. 147, explained.]—See MECHANICS' LIENS, 3.

Otto Electrical Manufacturing Co. (1905) Limited, In re, [1906] 2 Ch. 390, followed.]—See COMPANY, 3.

Pastoral Finance Association Limited v. The Minister, [1914] A.C. 1083, applied.]—See ASSESSMENT AND TAXES, 1.

Penn v. Lord Baltimore (1750), 1 Ves. Sr. 444, referred to.]—See EXECUTORS AND ADMINISTRATORS, 2.

Petty v. Daniel (1886), 34 Ch.D. 172, followed.]—See CONTEMPT OF COURT.

Regina v. Bassett (1884), 10 P.R. 386, distinguished.]—See CRIMINAL LAW, 3.

Regina v. Crossen (1899), 3 Can. Crim. Cas. 152, not followed.]—See CRIMINAL LAW, 4.

Regina v. Watson (1847), 2 Cox C.C. 376, referred to.]—See CRIMINAL LAW, 2.

Regina v. Worton, [1895] 1 Q.B. 227, specially referred to.]—See CRIMINAL LAW, 3.

Renaud v. Thibert (1912), 27 O.L.R. 57, followed.]—See DIVISION COURTS, 1.

Rendell v. Grundy, [1895] 1 Q.B.S. 16, followed.]—SEE CONTEMPT OF COURT.

Rex v. Cook (1912), 27 O.L.R. 406, distinguished.]—See CRIMINAL LAW, 2.

Rex v. Corrie (1904), 68 J.P. 294, specially referred to.]—See CRIMINAL LAW, 3.

Rex v. Marcott (1901), 2 O.L.R. 105, explained.]—See CRIMINAL LAW, 5.

Rex v. Pember (1912), 3 O.W.N. 1216, followed.]—See MUNICIPAL CORPORATIONS, 3.

Rex v. St. Pierre (1902), 4 O.L.R. 76, followed.]—See MUNICIPAL CORPORATIONS, 3.

Rex v. West (1915), 34 O.L.R. 368, affirmed.]—See CRIMINAL LAW, 4.

Reynolds v. Agar (1906), 70 J.P. 568, specially referred to.]—See CRIMINAL LAW, 3.

Richardson's Conviction, Re (1915), 34 O.L.R. 545, reversed.]—See MUNICIPAL CORPORATIONS, 3.

Roach v. McLachlan (1892), 19 A.R. 496, distinguished.]—See CREDITORS RELIEF ACT.

Rogers v. Lambert (1890), 24 Q.B.D. 573, applied and followed.]—See DISCOVERY.

Roper v. Public Works Commissioners, [1915] 1 K.B. 45, distinguished.]—See NEGLIGENCE, 2.

Rose v. McLean Publishing Co. (1896-7), 27 O.R. 325, 24 A.R. 240, distinguished.]—See COPYRIGHT.

Shoolbred v. Clarke, Re Union Fire Insurance Co. (1890), 17 S.C.R. 265, followed.]—See BANKS AND BANKING.

Short v. Field (1915), 32 O.L.R. 395, followed.]—See VENDOR AND PURCHASER.

Skinner v. Farquharson (1902), 32 S.C.R. 58, referred to.]—See WILL, 1.

Slater v. Laberee (1905), 9 O.L.R. 545, followed.]—See DIVISION COURTS, 1.

Toronto and York Radial R.W. Co. v. City of Toronto (1913), 25 O.W.R. 315, applied.]—See STREET RAILWAY.

Toronto, City of, and Toronto and York Radial R.W. Co., Re (1913), 28 O.L.R. 180, 25 O.W.R. 315, referred to.]—See HIGHWAY, 2.

Toronto, City of, v. Metropolitan R.W. Co. (1900), 31 O.R. 367, applied.]—See STREET RAILWAY.

Towers v. Dominion Iron and Metal Co. (1885), 11 A.R. 315, followed.]—See SALE OF GOODS, 2.

Trufort, In re (1887), 36 Ch.D. 600, referred to.]—See EXECUTORS AND ADMINISTRATORS, 2.

Turner v. Collins (1871), L.R. 7 Ch. 329, referred to.]—See DEED.

Utterson Lumber Co. v. H. W. Petrie Limited (1908), 17 O.L.R. 570, followed.]—See CONTRACT, 4.

Wallis Son & Wells v. Pratt & Haynes, [1910] 2 K.B. 1003, [1911] A.C. 394, followed.]—See SALE OF GOODS, 2.

Wauthier v. Wilson (1912), 28 Times L.R. 239, applied.]—See PROMISSORY NOTE.

Wedmore, In re, [1907] 2 Ch. 277, approved and followed.]—See WILL, 3.

Wentworth, County of, v. Hamilton Radial Electric R. W. Co. and City of Hamilton (1914), 31 O.L.R. 659, reversed.]—See HIGHWAY, 2.

Youlden v. London Guarantee and Accident Co. (1912-13), 26 O.L.R. 75, 28 O.L.R. 161, followed.]—See INSURANCE.

CAVEAT EMPTOR.

See SALE OF GOODS, 2.

CERTIFICATE OF TREASURY BOARD.

See BANKS AND BANKING, 2.

CHARGES AND EXPENSES.

See EXECUTORS AND ADMINISTRATORS, 1.

CHARITABLE INSTITUTION.

See NEGLIGENCE, 3.

CHATTEL MORTGAGE.

Security for Existing Debt and Future Indebtedness—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, secs. 5, 6—Invalidity as to Future Indebtedness—Validity as to other Part.—A chattel mortgage, given for the purpose of securing the payment of an existing debt, and also to secure future indebtedness, was admittedly invalid as against creditors, in so far as it purported to be a security for a future indebtedness, by reason of non-compliance with the requirements of sec. 6 (1) of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135; but, as security for the payment of an existing debt, was unobjectionable, the requirements of sec. 5 having been observed:—*Held* (RIDDLELL, J., *dubitante*), that the mortgage was good as a security for the existing indebtedness. — *Hughes v. Little* (1886), 17 Q.B.D. 204, 18 Q.B.D. 32, and *Campbell v. Patterson* (1893), 21 S.C.R. 645, specially referred to. *Hunt v. Long*, 502.

See LANDLORD AND TENANT, 2.

CHEQUE.

Loan — Evidence — Bankers' Stamps.]—A cheque drawn upon a bank, in favour of a person who endorses and cashes it, is not proof of a loan by the drawer to the endorser; the transaction evidences the payment of money only.—*Quære*, whether the marks stamped upon the cheque by the bank could be looked at to shew that the cheque was cashed by the endorser. *Re Harty v. Grattan*, 348.

See DIVISION COURTS, 1.

CHOSE IN ACTION.

See SET-OFF.

COMMITTAL.

See CONTEMPT OF COURT—DISCOVERY.

COMMITTEE.

See LUNATIC.

COMMON**BETTING-HOUSE.**

See CRIMINAL LAW, 3.

COMPANY.

1. *Shareholder—Summary Application for Removal of Name from Register—Companies Act, R.S.O. 1914, ch. 178, secs. 118, 119, 121—Agreement to Take Shares—Payment not Made—Election by Conduct to Become and Remain Shareholder.*]—An application by G., a shareholder of an incorporated company, in his own name and that of the company, for an order directing the removal of the name of B. from the register of shareholders

(see secs. 118, 119, and 121 of the Ontario Companies Act, R.S.O. 1914, ch. 178), was refused by a Judge, and his refusal was affirmed by the appellate Court; it being *held*, that these sections are not to be invoked except in a reasonably clear case; and that B. was, by agreement with the company, bound to pay at least par for the shares which stood in his name; and that he was none the less a shareholder because he had not yet paid, the price to be paid not having been settled.—*Per* HODGINS, J.A.:—B. became a shareholder by allowing his name to remain on the register and by acting as owner of the shares.—*Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor* (1915), 34 O.L.R. 161, followed.—The appeal was dismissed with costs; HODGINS, J.A., dissenting as to costs only. *Re Gramm Motor Truck Co. of Canada and Bennett*, 224.

2. *Winding-up—Contributories—Order of Judge in Regard to—Leave to Appeal from—Winding-up Act, R.S.C. 1906, ch. 144, sec. 101.*]—Upon an application under sec. 101 of the Winding-Up Act, R.S.C. 1906, ch. 144, for leave to appeal to a Divisional Court of the Appellate Division from an order of a Judge in Court affirming the placing of the applicant's name upon the list of contributories in the winding-up of a bank under the Act, it was *held*, granting the leave, that an appeal should be permitted where there is reasonable ground to suppose that the would-be ap-

pellant may obtain relief by further appeal, and a prolongation of the litigation cannot be regarded as vexatious. *Re Sovereign Bank of Canada, Clark's Case*, 448.

3. *Winding-up—Contributories—Subscriptions for Shares—Allotment—Election of Directors—Non-compliance with Provisions of Part VIII. of Ontario Companies Act*, 2 Geo. V. ch. 31—*Cancellation of Applications for Shares.*—Upon an appeal from the order of a Referee, in a proceeding for the winding-up, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, of a commercial company, incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, placing the names of five persons upon the list of contributories, it was held, that the company had never complied with the requirements of Part VIII. of that Act, and that persons who became subscribers for shares were entitled, notwithstanding the winding-up proceedings, to have their subscriptions cancelled and their names removed from the list of contributories. *In re Otto Electrical Manufacturing Co. (1905) Limited*, [1906] 2 Ch. 390, followed.—The charter having provided for three directors only, six could not be legally elected; and, the company having assumed to elect six directors, they must be considered to have acted under that election, and not by virtue of three of them being directors under the charter; there never was a valid board of directors elected, the charter direc-

tors never assumed to act, and no valid allotment was ever made of any shares. *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, 50, 53, followed.—The enactments contained in Part VIII. (secs. 110-115) are for the protection of shareholders, and in the above respect and in other respects were not complied with. *Re Carpenter Limited, Hamilton's Case*, 626.

See BANKS AND BANKING—
CONTRACT, 2, 4—DISCOVERY—
EXECUTORS AND ADMINISTRATORS, 2—STATUTE OF FRAUDS.

CONDITIONAL SALE.

See CONTRACT, 4—SALE OF
GOODS, 1.

CONDONATION.

See CONTEMPT OF COURT.

CONSENT.

See CRIMINAL LAW, 4—NEG-
LIGENCE, 2.

CONSIDERATION.

See CONTRACT, 5—PROMISSORY
NOTE—TRUSTS AND TRUSTEES.

CONSTITUTIONAL LAW

See BANKS AND BANKING, 2.

CONTEMPT OF COURT.

*Disobedience of Judgment—
Motion to Commit Defendants—
Preliminary Objections—Non-
compliance with Rule 298—Irr-
regularity—Direction for Service of
New Notice of Motion—Failure
to Specify Portions of Judgment
Disobeyed—Condonation—Rules*

183, 184—*Cessation from Act Constituting Contempt—Separate School Trustees—Employment of Unqualified Teacher—Use of French as Language of Instruction—Misconduct—Imposition of Fines—Locus Pœnitentiæ—Undertaking—Costs.*]—The proceedings upon a motion by the plaintiff to commit two of the defendants for contempt of Court were technically irregular by reason of non-compliance with Rule 298, but the Court had power to condone the irregularity; it was suggested that the irregularity had been cured by the course which the proceedings had taken; but, for greater security, the motion was retained, and the plaintiff allowed to serve a new notice of motion.—A new notice of motion having been served, it was objected on the return of it, that it did not specify any particular term or clause of the judgment in respect of disobedience to which commitment was asked:—*Held*, applying Rules 183 and 184, that the objection should be overruled and the irregularity, if any, condoned.—*Rendell v. Grundy*, [1895] 1 Q.B. 16, and *Petty v. Daniel* (1886), 34 Ch.D. 172, followed.—Where a contempt has been committed, it is not cancelled, obliterated, or purged by mere cessation from the act constituting contempt; and in this case the jurisdiction to entertain the plaintiff's motion to commit the respondents for breach of the injunction contained in the judgment in 31 O.L.R. 360, affirmed in 34 O.L.R. 346, was not ousted, by cessation, before the service of the

second notice, from one of the acts complained of—the continuing to employ an unqualified teacher in the school of the section of which the respondents were trustees.—The respondents were guilty of contempt in that respect, and also in allowing the use of French as the language of instruction or communication in the school, and there was nothing to shew that that use had been discontinued; there was actual misconduct; no ground for saying that they had honestly misinterpreted the terms of the judgment.—They were ordered to pay fines and the costs of the motion from the time of the service of the second notice; but the issue of the order was stayed for a limited period to allow the respondents an opportunity of paying the costs and filing an undertaking as to their future acts; and it was directed that, upon their so doing, the issue of the order should be perpetually stayed. *McDonald v. Lancaster Separate School Trustees*, 614.

See DISCOVERY.

CONTRACT.

1. *Agreement between Companies for Supply of Natural Gas—Construction and Scope—Right of Supplying Company to Supply Others—Remedy for Breach—Injunction—Damages—Purchase of Fee in Lands Subject to Gas-leases—Right of Purchaser to Forfeit or Accept Surrender of Leases—Interest in Land—Gas Treated as Chattel—Validity of Contract—Rule against Perpetuities.*]—The provisions of an agreement for

the supply of natural gas by the M. company to the T. company had not the effect of compelling that company to store up all its assets in order to be able, at some future indefinite time, to meet any possible demand which might be made upon it by the T. company: in effect, the agreement conceded to the M. company the right to supply others with gas after the T. company had been supplied.—*Dolan v. Baker* (1905), 10 O.L.R. 259, 270, applied.—*Seemle*, that, if the M. company were withholding gas to the detriment of the T. company, the right to an injunction would depend on the circumstances then existing.—*Held*, however, upon the evidence, that the T. company had suffered no wrong at the hands of the M. company or the other defendants.—*Held*, also that the defendant the G. company had the right to buy the fee in the lands worked by the M. company; having done so, it could forfeit or accept a surrender of the leases, unless its doing so interfered with the rights of the T. company under the contract; if that contract did not relate to land so as to give the T. company an interest in it, that company could not complain of the dealings of the other two companies *inter se*; and in the contract the gas was dealt with as a chattel only.—The defendants pleaded that the whole contract was void as transgressing the rule against perpetuities; but this could have reference only to clause 5, giving a right of entry upon the lands, at the T. company's option, to bore for gas. Whether clause 5

was void or not, the rest of the contract was effective and binding; clause 5 gave a remedy only upon breach of it; and it was unnecessary now to decide the point raised. *Tilbury Town Gas Co. Limited v. Maple City Oil and Gas Co. Limited*, 186.

2. *Brokers—Loan of Company-shares—Terms—Deposit of Security at Market Price—Offer to Return Shares—Refusal of—Tender—Price of Shares—Rise in Value—Action for Return.*—*“Borrowing”* in stock-broking circles does not imply a return of the very stock certificates “borrowed;” the loan is repaid by the return of stock certificates of the same amount and kind of stock as that borrowed; the borrower has the right to return the stock or any part of it at any time and demand the return to him of the amount of money paid by him as security for that stock or an aliquot part thereof.—The plaintiff, a broker, who “lent” shares in a mining company to the defendant, also a broker, upon the above terms—the defendant putting up as security a sum of money representing the market value of the shares “lent” at the time of the lending—was asked by the defendant, when the price of the stock went down, to refund the money and take back the shares, but refused to do so. When the shares came up to the price at which the loan was made, the defendant sold them:—*Held*, that no formal tender was necessary; and that the plaintiff's action for a return of the shares, brought after the price had risen

beyond that at which the loan was made, was properly dismissed. *Wills v. Ford and Doucette*, 126.

3. *Purchase of Bonds of Railway Company—Broker Becoming Purchaser—Evidence—Correspondence—Memorandum in Writing—Statute of Frauds, R.S.O. 1914, ch. 102, sec. 2—Interest in Land—Misrepresentations—Terms of Contract—Waiver.*—An appeal by the defendant from the judgment of CLUTE, J., 34 O.L.R. 403, was dismissed, the Court being divided in opinion.—*Held*, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J. (1) that the defendant was the purchaser of the bonds; (2) that the alleged misrepresentation of the plaintiffs was without effect; (3) that, if the sale was subject to the favourable opinion of the defendant's solicitor as to the legality of the bonds, that term was waived by the defendant; and (4), if the bonds were such as would come within sec. 2 of the Statute of Frauds, that the statute was met by the correspondence between the parties: the subject of the contract, if uncertain, was ascertainable.—*Held*, by MAGEE, J.A., and LATCHFORD, J., that the defendant was entitled to succeed upon the defence of the Statute of Frauds. *McKinnon v. Doran*, 349.

4. *Sale of Brick-yard to Company—Default in Payment—Repossession by Vendor—Retention of Bricks of Company—Liability of Vendor for Value—Right to New Machines on Premises—*

Debentures of Company Transferred in Part Payment of Price—Right of Vendor to Seize Chatels—Winding-up of Company—Claim upon Debentures—Promissory Notes Given for Price of Machine—Right to Sue upon, while Retaining Machine—Set-off—"Mutual Debts"—Judicature Act, sec. 126—Winding-up Act, sec. 71.—The defendant sold to a brick company his land used as a brick-yard and his brick-making plant. The purchaser agreed, while in possession, to operate the plant so as not to impair its value or that of the lands connected therewith; and that, upon default in payment of any of the instalments, the purchaser's right under the contract should cease, and the defendant as vendor might re-enter.—*Held*, upon the evidence, that the defendant was properly charged with \$6,300 for bricks, finished and unfinished, which came into his hands when he repossessed.—(2) That the plaintiff was not entitled to recover the machines which were upon the premises when the defendant repossessed.—(3) That the defendant could not justify taking and retaining other chattels on the premises.—(4) That the defendant's claim for the amount of an account was properly allowed at \$546.05; the amount could not be set off, but the defendant should rank for it upon the assets in the liquidation.—(5) That the circumstances with regard to the machine for which the company's promissory notes were given did not afford a legal defence to the

claim upon the notes: the defendant was entitled to recover upon the notes and also retain the property until payment.—*Canadian Westinghouse Co. v. Murray Shoe Co.* (1914), 31 O.L.R. 11, and *Utterson Lumber Co. v. H. W. Petrie Limited* (1908), 17 O.L.R. 570, followed.—(6) The defendant was not entitled to set off the amount of the notes against the plaintiff's claim, but was entitled to rank thereon upon the assets in liquidation: it was not a case of *mutual* debts: *Judicature Act*, R.S.O. 1914, ch. 56, sec. 126; *Winding-up Act*, R.S.C. 1906, ch. 144, sec. 71.—*Eberle's Hotels and Restaurant Co. Limited v. Jonas* (1887), 18 Q.B.D. 459, followed.—*Moody v. Canadian Bank of Commerce* (1891), 14 P.R. 258, distinguished. *Wade v. Crane*, 402.

5. *Sale of Land and Business*—*Mistake*—*Rescission*—*Return of Money Paid*—*Restoration of Property*—*Executed or Executory Contract*—*Failure of Consideration*—*Impossibility of Performance*—*Municipal By-Law*—*Invalidity*—*Power to Suspend Operation in Individual Cases.*]

The plaintiffs agreed with the defendant, who was in the milk business, to buy his land and premises, plant and goodwill, and to employ him as manager. The intention was to enlarge the buildings and plant and to extend the existing business. At the time of making the agreement, a by-law was in force in the city which provided that a certain district, of which the defendant's land formed part,

should be a residential area, and prohibited the erection in it of any factory. The existence of the by-law was not known to either the plaintiffs or the defendant when they made their agreement; and, when they learned of the difficulty which the by-law apparently created, they tried to get over it, but were unsuccessful, and the defendant resumed possession as owner.—The judgment of MIDDLETON, J., dismissing an action for rescission of the agreement, was affirmed.—*Held, per GARROW and MACLAREN, J.J.A.*, that, as both parties acquiesced in the conclusion that the by-law was valid, and that it presented an insuperable obstacle to carrying out the original intention, it was immaterial whether the by-law was or was not valid; there being no evidence that the price agreed upon was made in any way to depend upon the proposed additions and enlargements, it could not be said that there was a total or even a partial failure of consideration; there was no mistake, mutual or otherwise, about the parties, the subject-matter, or the consideration; and, even if it were assumed that there was a failure of consideration, the money paid upon the contract before the failure could not be recovered back.—*Per MEREDITH, C.J.O., and HODGINS, J.A.*:—The prohibition in the by-law existed at the date of the contract; and, if it rendered the purpose an impossible one on that date, the contract would be void *ab initio*, subject to whatever qualifications in the consequent rights of

the parties might be found to subsist owing to its having been executed partly or in whole. But, according to *Re Nash and McCracken* (1873), 33 U.C.R. 181, the by-law was always bad on its face; and the plaintiff's mistake in imagining that the contract had always been impossible of performance was not a ground for relief. *Milk Farm Products and Supply Co. Limited v. Buist*, 325.

See BANKS AND BANKING, 1—DISCOVERY—HIGHWAY, 2—MECHANICS' LIENS—NEGLIGENCE, 3—PARENT AND CHILD—PATENT FOR INVENTION—PROMISSORY NOTE—SALE OF ANIMAL—SALE OF GOODS—STATUTE OF FRAUDS—STREET RAILWAY—VENDOR AND PURCHASER.

CONTRIBUTORIES.

See BANKS AND BANKING, 1, 2—COMPANY, 2, 3.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1, 2—RAILWAY—TRIAL.

CONVEYANCING AND LAW OF PROPERTY ACT.

See SET-OFF.

CONVICTION.

See CRIMINAL LAW—MUNICIPAL CORPORATIONS, 3.

COPYRIGHT.

"Literary Composition"—Title or Name of Book—Infringement by Use of Similar Name—Copyright Act, R.S.C. 1906, ch. 70,

sec. 4—"Passing off"—Reputation—Evidence.]—There cannot in general be any copyright in the title or name of a book. *Dictum* of James, L.J., in *Dick v. Yates* (1881), 18 Ch. D. 76, approved.—Under the Canadian Copyright Act, R.S.C. 1906, ch. 70, sec. 4, unless the title itself amounts to a literary, scientific, or artistic work or composition, it cannot form the subject of copyright.—In this case, the name of the plaintiff's book, being simply descriptive of the book, was not the subject of copyright.—The defendant company had published and was selling a book with a similar name; but it was held, that the public reputation of the plaintiff's book had not been so established as to give him a right to complain of the "passing off" of the defendant company's book as his, even if there were adequate evidence of the "passing off." *Rose v. McLean Publishing Co.* (1896-7); 27 O.R. 325, 24 A.R. 240, distinguished.—An appeal from the decision of MASTEN, J., was dismissed, but without costs. *McIndoo v. Musson Book Co.*, 42, 342.

CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

COSTS.

See CONTEMPT OF COURT—EXECUTORS AND ADMINISTRATORS, 1—HUSBAND AND WIFE—MORTGAGE—MUNICIPAL CORPORATIONS, 1—SOLICITOR—VENDOR AND PURCHASER—WILL, 2.

COUNTERCLAIM.

See LANDLORD AND TENANT, 3.

COURTS.

See APPEAL—DIVISION COURTS.

COVENANT.

See MORTGAGE.

CREDITOR.

See WILL, 3.

CREDITORS RELIEF ACT.

Execution — Sheriff's Sale — Assignment for Benefit of Creditors—Rights of Subsequent Execution Creditors—R.S.O. 1914, ch. 81, sec. 6.—Section 6 of the Creditors Relief Act, R.S.O. 1914, ch. 81, applies to a case where the sheriff has realised money by sale of a debtor's property under execution, and made the entry required by sub-sec. 1, before the making by the debtor of a general assignment for the benefit of creditors; and the fund realised is divisible among all creditors coming in within the time limited by sub-sec. 2, although after the assignment.—*Roach v. McLachlan* (1892), 19 A.R. 496, and *Breithaupt v. Marr* (1893), 20 A.R. 689, distinguished on the ground that the sheriff's sale in the first case was *after* the chattel mortgage and in the second case *after* the assignment, and so the sheriff was selling the goods of the chattel mortgagee and of the assignee.—*Dictum* of MACLENNAN, J.A., in *Breithaupt v. Marr*, at p. 694, approved. *Re Harrison*, 45.

See SOLICITOR.

CRIMINAL LAW.

1. *Fraud of Trader—Failure to Keep Books—Period of Time—Criminal Code, sec. 417 (c)—Fraudulent Intent.*—It is an essential element of the offence described in sec. 417 (c) of the Criminal Code that the person charged shall not, for five years next before his inability to pay his creditors arose, have kept such books of account as are necessary to exhibit or explain his transactions, etc.; and, where the charge was that the person, being a trader and indebted to an amount exceeding \$1,000, and unable to pay his creditors in full, had not kept the necessary books, and it appeared that he had been in business for nine months only, a conviction based on sec. 417 (c) was quashed. *Rex v. Porter*, 339.

2. *Indecent Act—Public Place—Criminal Code, sec. 205—Conviction — Information — “Wilfully”—Amendment—“Place to which Public Permitted to have Access”—“In the Presence of one or more Persons.”*—An information charging an offence against sec. 205 of the Criminal Code was defective in omitting to charge that the act was done “wilfully;” but the defect might be supplied by amendment, after conviction by a magistrate, the evidence disclosing the wilful nature of the act.—(2) The magistrate was justified in finding that a “massage parlour,” to which apparently all comers were admitted, was a “place to which the public . . . are permitted

to have access.”—*Rex v. Cook* (1912), 27 O.L.R. 406, distinguished.—(3) That an abominable act of indecency committed by the defendant in her “massage parlour,” no person being present except the man who was a party to it, did not come within the section—it is enough that one person should be shewn to be present, but it must be a person other than those engaged in the offence.—*Regina v. Watson* (1847), 2 Cox C.C. 376, and *Elliot's Case* (1861), L. & C. 103, referred to. *Rex v. Clifford*, 287.

3. *Keeping Common Betting-house*—*Criminal Code*, secs. 227, 228—*Police Magistrate's Conviction—Evidence to Sustain—Betting-slips, Money, and Bank-books Found on Premises—Forfeiture of Money.*—A motion to quash a Police Magistrate's conviction of the defendant for unlawfully keeping a common betting-house was dismissed, where certain things discovered upon the defendant's person and in his house, when searched by the police under warrant, especially betting-slips, money, and bank-books shewing the deposit by the defendant of large sums of money, afforded more than a scintilla of evidence that the house was opened, kept, and used for the purpose of betting with persons resorting thereto and for the purpose of receiving deposits on bets as consideration for a promise to pay on the events of races: *Criminal Code*, secs. 227 and 228.—*Regina v. Bassett* (1884), 10 P.R. 386, distinguished.—*Reynolds v. Agar*

(1906), 70 J.P. 568, *Regina v. Worton*, [1895] 1 Q.B. 227, and *Rex v. Corrie* (1904), 68 J.P. 294, specially referred to.—The forfeiture of the moneys seized upon the defendant's premises was affirmed, as well as the conviction. *Rex v. Johnson*, 215.

4. *Obstructing Peace Officer*—*Criminal Code*, sec. 169—*Summary Conviction by Police Magistrate—Indictable Offence—Option of Crown—Procedure—Mode of Trial—Consent of Accused—Secs. 773 (e) and 778 of Code.*—The decision of MIDDLETON, J., 34 O.L.R. 368, was affirmed.—*Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152, not followed.—*Rex v. West*, 95.

5. *Undertaking to Tell Fortunes*—*Criminal Code*, sec. 443—*Evidence—Deception—Intent to Defraud.*—To warrant a conviction for undertaking to tell fortunes, contrary to sec. 443 of the *Criminal Code*, an intent to delude and defraud on the part of the person charged must be shewn, but it is not necessary to shew that he has succeeded in deceiving or defrauding.—*Rex v. Marcott* (1901), 2 O.L.R. 105, explained. *Rex v. Monsell*, 336.

See MUNICIPAL CORPORATIONS, 3, 4.

CROWN.

See CRIMINAL LAW, 4—NEGLIGENCE, 2.

CROWN LANDS.

Purchase from Department—Assignment of Locatee's Rights for Value—Bona Fides—Delay

*in Performance of Settlement Duties and in Registration of Assignment—Sale of Locatee's Interest under Execution—Sheriff's Deed—Contest between Assignee and Purchaser—Dates of Recording Instruments in Department—Priorities—Public Lands Act, R.S.O. 1897, ch. 28, secs. 19, 31, 37; 3 & 4 Geo. V. ch. 6, secs. 16, 44 (1).—*In an action by an assignee of a locatee of Crown lands to set aside a sheriff's sale by the defendant of the locatee's interest in the lands, under execution.—*Held*, upon the evidence that the sale to the plaintiff by the locatee (her father) was a *bonâ fide* sale and for value; that there was no intention on the part of the plaintiff to defeat, hinder, or delay her father's creditors; and, although the plaintiff had been guilty of laches in regard to the performance of the settlement duties and in notifying the Department of the assignment to her, yet, as the Crown had not chosen to cancel the rights of the father, and had recognised the assignment, the plaintiff was entitled to a declaration that the defendant took no interest under the sheriff's deed, and that the lots were the property of the plaintiff, subject to the rights of the Crown in regard to the performance of settlement duties.—Sections 19, 31, and 37 of the Public Lands Act, R.S.O. 1897, ch. 28, and secs. 16 and 44 (1) of the Public Lands Act, 3 & 4 Geo. V. ch. 6, considered. *Hamilton v. Shaule*, 584.

CRUELTY.

See HUSBAND AND WIFE.

CUSTODY OF INFANT.

See INFANT.

DAMAGES.

See CONTRACT, 1—LANDLORD AND TENANT, 3—NEGLIGENCE, 3.

DEATH.

See NEGLIGENCE, 1, 2.

DEBENTURES.

See CONTRACT, 4.

DECEIT.

See LANDLORD AND TENANT, 3.

DECLARATORY JUDGMENT

See LIMITATION OF ACTIONS.

DEED.

Release of Interest in Land—Voluntary Deed—Action to Set aside—Lack of Independent Advice—Undue Influence—Laches.—The finding of SUTHERLAND, J., against the validity of a deed executed by the plaintiff, releasing her interest in land, was affirmed; his further finding that the plaintiff had, by a delay of twelve years, disentitled herself to relief, was reversed; and judgment was directed to be entered in favour of the plaintiff setting aside the deed in question, with costs. — *Huguenin v. Baseley* (1807), 14 Ves. 273, *Allcard v. Skinner* (1887), 36 Ch.D. 145, and *Turner v. Collins* (1871), L.R. 7 Ch. 329, referred to. *Stonehouse v. Walton*, 17, 485.

See TRUSTS AND TRUSTEES.

DEFAMATION.

See LIBEL.

**DEFECTIVE CONDITION
OF WORKS.**

See MASTER AND SERVANT.

DEFECTIVE SYSTEM.

See NEGLIGENCE, 1.

DEVIATION.

See STREET RAILWAY.

DIRECTORS.

See COMPANY, 3—STATUTE OF
FRAUDS.

DISCLAIMER.

See TRUSTS AND TRUSTEES.

DISCOVERY.

*Examination of Officer of Defendant Company—Status of Shareholder as Plaintiff—Pleading—Companies—Breaches of Contract—Complaint of Minority Shareholders—Acts of Majority—Ultra Vires or Fraudulent Acts—Scope of Discovery—Right of Action—Motion to Commit—Practice—Forum.]—Whatever the state of the pleadings, questions put upon the examination for discovery of a party, or the officer of a corporation-party, concerning any matter which cannot give, directly or indirectly, separately or in conjunction with something else, a cause of action or a defence to an action, must be disallowed; and a defendant, or the officer of a defendant corporation, may, upon examination for discovery, by declining to answer, raise the objection that the plaintiff has no right to sue at all, and therefore has no right to discovery.—*Rogers v. Lambert* (1890), 24*

Q.B.D. 573, applied and followed.—Where an officer of a corporation-party has declined to answer questions asserted to be proper, the correct practice is for the examining party to move to commit the officer or for a writ of attachment; and the motion may be made in Chambers if all that is desired be an adjudication upon the propriety of the refusal.—The facts alleged in this case were sufficient to bring the acts of the defendants, as shareholders of the contracting company, within the rule which requires that the acts complained of shall be of a fraudulent character or beyond the powers of the company; and the officer of the trust company, on examination for discovery, was compellable to answer questions based upon the allegations of the statement of claim.—*Burland v. Earle*, [1902] A.C. 83, 93, followed. *Shaw v. Union Trust Co. Limited*, 146.

DISCRETION.

See LIMITATION OF ACTIONS.

DISTRESS.

See LANDLORD AND TENANT, 2.

DIVISION COURTS.

1. *Jurisdiction—Ascertainment of Amount over \$100—Division Courts Act, R.S.O. 1914, ch. 63, sec. 62 (1) (d)—Cheque—Loan—Evidence.]—Where the claim exceeds \$100, a Division Court has no jurisdiction unless the claim is ascertained as a debt by a document signed by the defendant, and the plaintiff's case is*

proved without other evidence than the proof of the signature: Division Courts Act, R.S.O. 1914, ch. 63, sec. 62 (1) (d).—*Slater v. Laberee* (1905), 9 O.L.R. 545, and *Renaud v. Thibert* (1912), 27 O.L.R. 57, followed.—The plaintiff's claim upon a cheque for \$150, drawn by him upon his bankers, payable to the defendant, endorsed by the defendant, and said to have been cashed by him, was held to be beyond the jurisdiction of a Division Court. *Re Harty v. Grattan*, 348.

2. *Territorial Jurisdiction* — *Action for Price of Goods*—*Place of Payment*—*Place of Delivery*—*Dispute-note Filed by Defendant*—*Failure to Appear at Trial*—*Judgment on Admission*—*Motion for Prohibition.*—The plaintiffs, carrying on business at D., sued the defendant, living at S., for the price of goods shipped to him (at S.) by the plaintiffs (at D.) The action was brought in a Division Court, in the territory of which D. was included. The defendant filed a dispute-note, but did not appear at the trial, and judgment was given against him for the amount claimed by the plaintiffs, with interest, and his counterclaim was dismissed:—*Held*, that, as the defendant did not attend at the trial, and it did not appear that any injustice would be done by allowing the judgment to stand, the Court ought not to grant a prohibition. —*Re Canadian Oil Companies v. McConnell* (1912), 27 O.L.R. 549, followed. *Held*, also, that the place of payment for the goods was D., where the creditors

were—the debtor must seek his creditor; and, even if it could be argued that the delivery was not at D., that was a fact to be determined by the Judge in the Division Court; and not till he found that the delivery was not at D. would his jurisdiction be ousted.—All things giving the cause of action occurred in the local jurisdiction of the forum chosen by the plaintiffs, and it had jurisdiction, though it was foreign to the debtor's residence. *Re Sovereign Mitt Glove and Robe Co. v. Cameron*, 143.

DOMICILE.

See EXECUTORS AND ADMINISTRATORS, 2.

ELECTION.

See COMPANY, 1—SALE OF GOODS, 2—TRUSTS AND TRUSTEES.

ELECTRIC POWER

See NEGLIGENCE, 2.

EQUITABLE RELIEF.

See TRUSTS AND TRUSTEES.

ESTOPPEL.

See BANKS AND BANKING, 2.

EVIDENCE.

Appeal from Award under Railway Act of Canada—*Ascertainment of Reasons of Arbitrators*—*Examination of Arbitrator as Witness*—*Necessity for Leave of Appellate Court.*—Upon an appeal from an award under the Railway Act of Canada, it is desirable to have the reasons of the arbitrators for making the

award, either by the statement of a case or by the delivery of written reasons for the information of the Court. These must not be obtained *ex parte*, and the views of one arbitrator cannot be used unless, at least, all have had an opportunity of stating theirs. And the examination of one of the arbitrators, pending an appeal, is not the proper way of obtaining the needed information.—*O'Rourke v. Commissioner for Railways* (1890), 15 App. Cas. 371, 377, applied.—An appointment issued by the appellant, without the leave of the appellate Court, for the examination of one of the arbitrators as a witness with a view to elicit his evidence as such, for use on a pending appeal, was set aside.—*Crowley v. Boving and Co. of Canada* (1915), 33 O.L.R. 491, followed. *Re Clarkson and Campbellford Lake Ontario and Western R.W. Co.*, 345.

See APPEAL—CHEQUE—CONTRACT, 3—COPYRIGHT—CRIMINAL LAW, 3, 5—HUSBAND AND WIFE—LANDLORD AND TENANT, 1—LIBEL—MUNICIPAL CORPORATIONS, 2—RAILWAY—STATUTE OF FRAUDS—WILL, 1.

EXAMINATION OF ARBITRATOR.

See EVIDENCE.

EXAMINATION OF PARTIES.

See DISCOVERY.

EXECUTION.

See CREDITORS RELIEF ACT—CROWN LANDS.

EXECUTORS AND ADMINISTRATORS.

1. *Charges and Expenses*—*Allowance by Surrogate Court Judge*—*Costs of Action Unsuccessfully Defended*—*Reasonableness of Defence*—*Direction of Judge at Trial of Action*—*Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 19.*—Where a man defends an action brought against him as executor and fails, he may be forced to pay the costs out of his own pocket; but he is entitled to be allowed, out of the estate in his hands as executor, all reasonable expenses which have been incurred in the management of the estate, and these include the costs of an action reasonably defended.—A Surrogate Court Judge, when asked to allow an executor such costs, must deal with them as charges and expenses; and the direction of the trial Judge in the action in which such costs were incurred, as to allowance out of the estate or otherwise, cannot bind the Surrogate Court Judge.—Section 19 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, considered.—*In re Beddoe*, [1893] 1 Ch. 547, followed.—Where the plaintiffs' costs of an action brought against an executor as such were, by the judgment in the action, ordered to be paid by the executor, and were so paid, the allowance by the Surrogate Court Judge to the executor, on his passing his accounts, of the sum so paid, and also his own costs of defending the action, was affirmed—there being nothing to shew that the action was unreasonably defended. *Re Dingman*, 51.

2. *Intestate Domiciled in Foreign Country—Property in Ontario—Ancillary Letters of Administration—Title to Company-shares—Issue as to Ownership—Forum—Jurisdiction—Sale of Shares pendente Lite.*]—F., domiciled and resident in the State of Michigan, died there, *intestate*. Letters of administration to his estate were granted to a Michigan trust company by a Michigan Court; and subsequently, for the purpose of enabling shares of the capital stock of a commercial company incorporated in Canada, standing in the name of F., to be effectively dealt with, letters of administration, limited to the property of the deceased within the Province of Ontario, wherein the head office and works of the Canadian company were situated, were issued to an Ontario trust company; and a claim to the beneficial ownership of the shares as against the deceased and his estate, was made by E.:—*Held*, that, as the shares had a local *situs* in Ontario, and the legal title was in the Ontario administrators, even though the Ontario letters of administration should be regarded as ancillary, the question of the true ownership should be determined by an Ontario Court.—*Semble*, that, had an action been brought by E. against F. in his lifetime, the Courts of Michigan could have determined the title to assets having a *situs* beyond that State, because they had jurisdiction over his person; or had F. died testate, so that the property vested in his executors, if they were subject to the juris-

diction of the Michigan Court, an action might well be maintained there.—*In re Trufort* (1887), 36 Ch. D. 600, *Enohin v. Wylie* (1862), 10 H.L.C. 1, 13, and *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444, referred to.—*Held*, also, that a sale of the shares should not be directed while the title was in doubt. *Re Fenwick*, 29.

EXPLOSION.

See NEGLIGENCE, 2.

EXPROPRIATION.

See ASSESSMENT AND TAXES, 1.

FINES.

See CONTEMPT OF COURT.

FIXTURES.

See SALE OF GOODS, 1.

FOREIGN COURT.

See EXECUTORS AND ADMINISTRATORS, 2.

FORFEITURE.

See CONTRACT, 1—CRIMINAL LAW, 3.

FORTUNE-TELLING.

See CRIMINAL LAW, 5.

FRAUD AND MISREPRESENTATION.

See ASSIGNMENTS AND PREFERENCES—CONTRACT, 3—CRIMINAL LAW, 1, 5.

GAMING.

See CRIMINAL LAW, 3.

GAS-LEASES.

See CONTRACT, 1.

GUARANTY.

See PROMISSORY NOTE—SALE OF GOODS, 1.

HAWKERS.

See MUNICIPAL CORPORATIONS, 3.

HIGHWAY.

1. *Nonrepair of Bridge—Collapse under Weight of Traction Engine—Death of Person Seated on Engine—Liability of Township Corporation—Municipal Act, 3 & 4 Geo. V. ch. 43, sec. 460 (1)—Notice or Knowledge of Defects—Traction Engine Act, 2 Geo. V. ch. 53, sec. 5 (4)—Failure to Comply with Requirements of—Absence of Causal Connection between Failure and Accident.*]

The defendants, a township corporation, were held liable, under sec. 460 (1) of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43, for the death of a person on the 1st August, 1913, which was found to have occurred in consequence of the disrepair of a bridge forming part of a highway in the township. The bridge gave way under the weight of a traction engine upon which the deceased was seated, engaged as a volunteer in steering it. The defendants had, as early as 1911, adequate notice of the disrepair into which the bridge had fallen.—If planks had been laid down by the deceased or the owner of the engine, before propelling it upon the bridge, in compliance with the Traction Engine Act, 2 Geo. V. ch. 53, sec. 5, sub-sec. 4, the bridge would still have fallen; and to make the failure to com-

ply with the requirements of the statute a defence, it must be shewn that there was a direct causal relation between such failure and the accident which followed.—The effect of the requirement of sub-sec. 4 considered; and *Goodison Thresher Co. v. Township of McNab* (1908-10), 19 O.L.R. 188, 44 S.C.R. 187, distinguished. *Linstead v. Township of Whitchurch*, 1.

2. *Toll Road Acquired by County—Abolition of Tolls—Toll Roads Expropriation Act, 1901—County Road—Annexation of Township Territory to City—Inclusion of Portion of Road—Order of Ontario Railway and Municipal Board—Vesting of Portion of Road in City—Powers of Board—Mileage Payments Agreed to be Made by Electric Railway Company to County—Transfer to City—Arbitration Provisions of Municipal Act.*]

It was held, by the majority of the Court (reversing the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 659), that the only notice required to be given by the statute in force when (27th September, 1909) the order of the Ontario Railway and Municipal Board was made, viz., notice to the adjacent township (8 Edw. VII. ch. 48, sec. 1), having been duly given, the Board had jurisdiction to make the order. The most that could be claimed by the plaintiff corporation was compensation in respect of the portion of the highway in the annexed territory, especially in respect of the money payable under the agreement with the

railway company, upon which the action was based. That, agreement, however, was entirely based upon a mileage rate.—*Semble*, that the plaintiff corporation might be entitled to a remedy under the provisions respecting arbitration contained in the Municipal Act.—*Per HODGINS, J.A.* (dissenting):—If the mileage payments were not divisible, the right of the granting municipality to receive what it had stipulated for could not be taken away. The mere annexation of the territory, including the road, did not deprive the county of a rental or of a payment for which it gave full value when it was in a position to do so. The shifting of municipal jurisdiction does not annul existing franchise agreements, although it prevents additions or alterations without the consent of those who for the time being have power over the highways.—*Re City of Toronto and Toronto and York Radial R.W. Co.* (1913), 28 O.L.R. 180, and in the Privy Council (1913), 25 O.W.R. 315, referred to.—The moneys paid by the railway company to the city corporation could not be recovered. *County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton*, 434.

See STREET RAILWAY.

HIGHWAY CROSSING.

See RAILWAY.

HOSPITAL.

See NEGLIGENCE, 3.

HUSBAND AND WIFE.

Alimony—Judicature Act, R.S.O. 1897, ch. 51, sec. 34—Cruelty—Findings of Trial Judge—Absence of Finding of Danger to Life, Limb, or Health—Evidence—Appeal—Costs—Disbursements—Rule 388.—To justify a judgment for alimony on the ground of cruelty, there must be a finding that the cruelty proved was such as to cause reasonable apprehension of danger to the life, limb, or health of the wife; and where that was not found by the trial Judge—although an assault was proved—and there was no evidence upon which the appellate Court could so find, a judgment awarding alimony to the wife, was set aside.—The jurisdiction of the Court is defined by the Judicature Act, R.S.O. 1897, ch. 51, sec. 34.—The Court could not do more than compel the husband to pay the wife “the amount of the cash disbursements actually and properly made by her solicitor:” Rule 388.—*Per RIDDELL, J.*, review of the authorities; *Lovell v. Lovell* (1906), 11 O.L.R. 547, 13 O.L.R. 569, 571, specially referred to. *McIlwain v. McIlwain*, 532.

HYDRO-ELECTRIC POWER COMMISSION.

See NEGLIGENCE, 2.

IMPOSSIBILITY OF PERFORMANCE.

See CONTRACT, 5.

INDECENT ACT.

See CRIMINAL LAW, 2.

INFANT.

Custody—Separation of Parents—Right of Father to Custody of Girl of Ten Years—Welfare of Infant—Conduct of Parents—Infants Act, R.S.O. 1914, ch. 153, sec. 2 (1).—The provision of the Infants Act with regard to the custody of infants, now found in R.S.O. 1914, ch. 153, sec. 2 (1), originally 50 Vict. ch. 21, sec. 1 (1), is not, in so far as it expresses concern for the welfare of the infant, intended to exalt the interest of the infant into one of paramount importance. Other things, such as the conduct of the parents, being equal, when it happens that the wishes of the parents conflict, the Court must determine which is to have the custody, having regard, however, to the father's practically immemorial right to control, unless he has forfeited that right by misconduct.—Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of the child merely because the wife prefers to live away from him.—*Re Mathieu* (1898), 29 O.R. 546, approved.—An order in Chambers awarding the custody of a girl of ten to the father, where the mother chose, without valid reason, to live apart from him, was affirmed (MACLAREN, J.A., dissenting). *Re Scarth*, 312.

See BANKS AND BANKING, 1—PARENT AND CHILD—PROMISORY NOTE—VENDOR AND PURCHASER.

INFORMATION.

See CRIMINAL LAW, 2—MUNICIPAL CORPORATIONS, 4.

INJUNCTION.

See CONTRACT, 1.

INSANE DELUSION.

See WILL, 1.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES—CREDITORS RELIEF ACT—LANDLORD AND TENANT, 2.

INSPECTION.

See SALE OF GOODS, 2.

INSURANCE.

Accident Insurance — Bodily Injury — Accidental Means — Sprained Wrist — Recovery Delayed by Presence of Disease in System—Disability Caused Exclusively by Accident—“Total Disability”—Findings of Fact of Trial Judge.—By a policy issued by the defendant company, the plaintiff was insured against “bodily injury sustained . . . through accidental means . . . and resulting, directly, independently, and exclusively of all other causes, in an immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation . . .”—*Held*, upon the evidence, that the condition of the plaintiff's arm, which was sprained by a fall, was referable, to some extent at least, to the presence in the plaintiff's system of tuberculosis; but, nevertheless, that the bodily injury

resulted, independently and exclusively of all other causes, in the plaintiff's total disability; the disease which had intervened was not another cause within the meaning of the policy—the tuberculosis was in the system, but was harmless until, as the direct result of the bodily injury, it was given an opportunity to become active.—*Coyle or Brown v. John Watson Limited*, [1915] A.C. 1, *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591, and *Youlden v. London Guarantee and Accident Co.* (1912-13), 26 O.L.R. 75, 28 O.L.R. 161, followed.—*Held*, also, that the plaintiff's injury entirely precluded him from doing his work as an eye, ear, nose, and throat specialist—and that constituted "total disability" within the meaning of the policy. *Mitchell v. Fidelity and Casualty Co. of New York*, 280.

INTEREST.

See MORTGAGE.

INTOXICATING LIQUORS.

See MUNICIPAL CORPORATIONS, 1, 2.

JUDGMENT.

See CONTEMPT OF COURT—DIVISION COURTS, 2—LIMITATION OF ACTIONS—WILL, 1, 2.

JURISDICTION.

See DIVISION COURTS—EXECUTORS AND ADMINISTRATORS, 2—LUNATIC—STREET RAILWAY.

JURY.

See LIBEL—NEGLIGENCE, 1—RAILWAY—SALE OF ANIMAL—TRIAL.

KEEPING COMMON BETTING-HOUSE.

See CRIMINAL LAW, 3.

LACHES.

See BANKS AND BANKING, 1—CROWN LANDS—DEED.

LAND.

See ASSESSMENT AND TAXES—CROWN LANDS—LIMITATION OF ACTIONS—VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. *Action for Rent—Dispute as to Length of Term—Evidence—Surrender—Acceptance—Intention.*—Upon the evidence, the defendant was held to be the tenant of the plaintiff for the term of six months.—The plaintiff had not, by receiving the key of the demised premises, putting up a "to let" notice, etc., accepted a surrender of the lease. Such acts are not conclusive—the intention must be looked at.—*Mickleborough v. Strathy* (1911), 23 O.L.R. 33, referred to. *McBride v. Ireson*, 173.

2. *Lease—Acceleration Clause—Chattel Mortgage—Assignment for Benefit of Creditors—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38 (1)—"During"—"Due"—Distress—Landlord's Preferential Claim for Arrears of Rent—Extent of—Fraud on Assignments*

and Preferences Act, R.S.O. 1914, ch. 134—Apportionment Act, R.S.O. 1914, ch. 156, sec. 4.]—G. was the tenant of a farm owned by the defendant, under an indenture of lease for a term of three years from the 1st January, 1914, at a rent of \$500 for 1914, \$600 for 1915, and \$600 for 1916; half of each year's rent was payable on the 1st October and the other half on the 31st December. The lease contained a covenant that if (among other things) the tenant should make a chattel mortgage or an assignment for the benefit of creditors, the then current year's as well as the next ensuing year's rent should immediately become due and payable, and the term thereby granted, at the option of the lessor, immediately become forfeited and void, and that such accelerated rent might be recovered in the same manner as the rent thereby reserved. During the term, G. made two chattel mortgages, one on the 11th January, 1915, and the other on the 1st May, 1915. On the 7th September, 1915, G. made an assignment to the plaintiff for the general benefit of creditors; and on the 9th September, 1915, the defendant distrained the goods and chattels on the farm for \$1,200, which he asserted to be, by virtue of the acceleration clause and by reason of the giving of the chattel mortgages, due and in arrear, being the rent for 1915 and 1916:—*Held*, by the Judge of first instance, that the defendant was entitled to a preferential lien only in respect of one year's rent (sec. 38 (1) of

the Landlord and Tenant Act, R.S.O. 1914, ch. 155); and an appeal by the defendant from that conclusion and a cross-appeal by the plaintiff were both dismissed (MEREDITH, C.J.O., and MAGEE, J.A., dissenting), with the variation that the money realised from the sale of the goods by the plaintiff (as directed by the Judge), less the expenses of the sale, should be paid into Court to abide further order.—*Held, per Curiam*, that the right to distrain is not taken away by sec. 38 (1).—Different opinions were expressed as to the construction and effect of sec. 38 (1). — MEREDITH, C.J.O., was of opinion that the acceleration clause was void as a fraud upon the Assignments and Preferences Act, R.S.O. 1914, ch. 134; but the other members of the Court did not agree in this.—The authorities were reviewed, and the following cases, specially referred to: *In re Hoskins and Hawkey* (1877), 1 A.R. 379; *Linton v. Imperial Hotel Co.* (1889), 16 A.R. 337; *Langley v. Meir* (1898), 25 A.R. 372. *Alderson v. Watson*, 564.

3. *Lease of Theatre with Furniture and Equipment—Surrender of Lease—Acceptance—Refusal of Lessee to Transfer License—Damages—Retention of Sum Deposited by Lessee as Security—Rent of Premises—Inadequacy of Heating—Implied Stipulation—Fitness for Habitation—Damages for Breach—Deceit—Counterclaim.*]—The artificial rule that in the letting of furnished houses and apartments an undertaking is

implied on the part of the lessor that they are reasonably fit for the purpose of habitation (*Smith v. Marrable* (1843), 11 M. & W. 5), applies where furnished premises are demised with the primary and principal purpose that they are to be at once used for human occupation.—This case came also within the broader principle of a necessary implication, enunciated in *Brymer v. Thompson* (1915), 34 O.L.R. 194, 543; *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488.—The lessee having gone into possession and occupied the premises—a furnished theatre—the implied undertaking that they should be fit for habitation was treated as a warranty, and the lessee *held* entitled to recover damages for the breach.—There had been an accepted surrender of the lease; and the claims of the lessee to recover a sum deposited with the lessors as security and for damages for deceit, and the counterclaim of the lessors for damages for breaches of the obligations and covenants contained in the lease, were denied.—The lessors were *held* entitled to recover damages for the lessee's refusal to transfer the theatre license after the surrender. *Davey v. Christoff*, 162.

LEASE.

See LANDLORD AND TENANT.

LEASE OF THEATRE.

See LANDLORD AND TENANT, 3.

LEAVE TO APPEAL.

See COMPANY, 2.

LEGACY.

See TRUSTS AND TRUSTEES—WILL, 3.

LETTERS OF ADMINISTRATION AND PROBATE.

See EXECUTORS AND ADMINISTRATORS, 2—WILL, 2.

LIBEL.

Pleading—Defence—Admission—Justification—Failure to Prove Truth of Alleged Libel—Jury—Verdict—Improper Admission of Evidence—Power of Amendment—New Trial.—A statement that the plaintiff had been fined and suspended from association race-tracks for assaulting C., the starter at a race-meeting, was the basis of an action for libel: innuendo, that the plaintiff had been guilty of an unlawful assault and of an indictable offence and of improper conduct as a horseman. Defence, justification “save that the plaintiff did not assault C., but was fined by him for irregularities on the race-track:”—*Held*, that the defence, if treated as one of justification simply, was disproved when it was shewn that C. intended to fine some one other than the plaintiff, notwithstanding that he recorded the fine against him. The jury, having found for the defendant, in face of an admission that the newspaper statement was untrue as to one part—a part clearly libellous in the circumstances—the verdict could not stand.—*Lumsden v. Spectator Printing Co.* (1913), 29 O.L.R. 293, followed.—*Held*, also, that evidence was improperly admitted of a pre-

vious fine imposed during the day for irregularities on the track, which fine was withdrawn.—*Held*, also, that the pleadings in an action for libel must define the issue which is being tried. The defendant upon a plea of justification is limited to proving the truth of his assertion. Evidence should not be admitted upon the theory that the pleadings do not bind the parties, because of the power to amend.—A new trial was ordered. *Govenlock v. London Free Press Co. Limited*, 79.

LIEN.

See LANDLORD AND TENANT, 2
—MECHANICS' LIENS—SOLICITOR.

LIMITATION OF ACTIONS.

Possession of Land—Limitations Act, R.S.O. 1914, ch. 75—Declaration of Title—Judicature Act, sec. 16 (b)—Declaratory Judgment—Discretion.—Though the Court has power under sec. 16 (b) of the Judicature Act, R.S.O. 1914, ch. 56 (as under the former Chancery General Order 538 and the English Order xxv., r. 5), to make binding declarations of right, whether any consequential relief is or could be claimed or not, the Court has, in all cases, a discretion to grant or withhold a mere declaration of right. In this case, that discretion was exercised adversely to the plaintiff claiming a declaration that she had a good title to land of which she was in possession—her alleged title being solely derived by length of pos-

session for a period exceeding the ten years prescribed by the Limitations Act, now R.S.O. 1914, ch. 75.—*Miller v. Robertson* (1904), 35 S.C.R. 80, followed. *Foisy v. Lord* (1911), 2 O.W.N. 1217, 3 O.W.N. 373, distinguished. *Réaume v. Coté*, 303.

See WRIT OF SUMMONS.

LIQUOR LICENSE ACT.

See MUNICIPAL CORPORATIONS, 1, 2.

LITERARY COMPOSITION.

See COPYRIGHT.

LOAN OF SHARES.

See CONTRACT, 2.

LOCAL OPTION BY-LAW.

See MUNICIPAL CORPORATIONS, 1, 2.

LOCATEE.

See CROWN LANDS.

LUNATIC.

Appointment of Committee—Place of Residence—Jurisdiction of Court.—The Court will not appoint as sole committee of the estate of a lunatic a person resident out of the jurisdiction of the Court.—*Ex p. Ord, In re Shields* (1821), Jac. 94, followed.—*In re Bruère* (1881), 17 Ch.D. 775, and *In re Hopper* (1897), 66 L.J. Ch. 569, explained. *Re Swain*, 613.

See WILL, 1.

MAINTENANCE.

See PARENT AND CHILD.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 1, 2.

MASTER AND SERVANT.

Injury to Servant—"Services of Workman Temporarily Let or Hired to Another"—Defective Condition of Works—Action against Hirer—Remedy under Workmen's Compensation Act, 4 Geo. V. ch. 25 (O).—Knowledge of Defect—Voluntary Assumption of Risk.—The plaintiff, a teamster employed by persons who did a teaming business, was sent by his employers with a team of horses to work in the yard of the defendants. While working there he received an injury which, he alleged, arose from a defect in a truck of the defendants which he was endeavouring to move with his employers' team; and he brought this action to recover damages for his injury:—*Held*, that the plaintiff was a workman temporarily let or hired to another by his employers, who continued to be his employers, and that he could not maintain the action: his rights, if any, were to be worked out under the provisions of the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O).—Sections 2, sub-sec. 1 (f), 4, 5, 9, 10, 13, and 15 of the Act, considered.—*Held*, also, upon the evidence, that the plaintiff knew of the defect, and, knowing and appreciating the risk, voluntarily assumed it. *Caplin v. Walker Sons*, 291.

See NEGLIGENCE, 1, 3.

MECHANICS' LIENS.

1. *Claim of Material-man—Erection of "Semi-detached" Houses for Different Owners on Adjoining Lots—Joint Contract or Separate Contracts—Material Furnished for one House within 30 days before Registration of Claim—Failure of Lien as to one Lot—Reduction of Amount as to other—Request and Benefit of Owner—Form of Registered Claim—Validity—Extent of Lien—Percentage of Contract Price—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 2 (c), 6, 12 (1), (2).*—The defendants C. and S. were respectively the owners of two adjoining lots; the defendant contractor made an offer in writing, addressed to both of them together, to build a pair of semi-detached houses, one house on each lot, and to do all labour and complete the houses for a named sum for each house. The offer was in fact accepted, but not in writing, and the houses were built:—*Held* (RIDDELL, J., dissenting), that C. accepted the tender as to one house, and S. as to the other, so as to constitute, when ratified, as it was, by the contractor, one contract between C. and the contractor for the C. house and another contract between S. and the contractor for the S. house.—A plumber had a sub-contract for the installation of the plumbing in both houses. The plaintiff furnished to the plumber materials which went into both houses, and claimed a lien therefor against both lots; the registration of his claim of lien was on the 3rd September;

no materials furnished for the S. house were supplied within 30 days before the 3rd September, but on the 6th August materials were furnished by the plaintiff which were placed by the plumber in the C. house on the 10th August:—*Held*, that the lien, so far as it affected the interest of S. in his lot, utterly failed; and the lien for the full amount claimed also failed as to the C. property—the C. interest could not be made liable for goods not supplied upon the request of C. and not for his direct benefit: *Mechanics and Wage-Earners Lien Act*, R.S.O. 1914, ch. 140, sec. 2 (c) (iv.).—It was a reasonable inference, however, that one-half of the materials was used in each house; and the plaintiff's lien, reduced to one-half the sum claimed, and restricted to the C. property, should prevail. *Campaigne v. Carver*, 232.

2. *Claims of Lien-holders — Claims of Mortgagees—Priorities—Increased Selling Value—Protected Payments or Advances—Mechanics and Wage-Earners Lien Act*, R.S.O. 1914, ch. 140, secs. 2 (c), 8 (3), 14, 21—*Registry Act*, R.S.O. 1914, ch. 124—*Application of*.]—Section 8 (3) of the *Mechanics and Wage-Earners Lien Act*, R.S.O. 1914, ch. 140, deals with the land itself, or with an estate or interest in it, which may be possessed by persons to whom the description of "owner" is applied under sec. 2 (c); and "prior" mortgages or charges are those which existed upon the land or upon an

estate or interest therein before the work or the furnishing of materials began.—*Kennedy v. Haddow* (1890), 19 O.R. 240, and *Cook v. Belshaw* (1893), 23 O.R. 545, followed.—There being in the Act a definite provision (sec. 14) dealing with mortgages, whether registered or unregistered, and declaring that payments or advances under them may be defeated by a registered or unregistered lien, either by notice in writing of such lien or by registration of a claim for such lien, that provision overrides any other right accruing or arising out of the *Registry Act*, R.S.O. 1914, ch. 124, which deals solely with priorities as between registered instruments; and the application of the *Registry Act* is, by sec. 21 of the other Act, predicated upon registration. *Cook v. Koldoffsky*, 555.

3. *Mortgagee—"Owner"—Materials Furnished to Contractor — Request, Credit, or Behalf—Privilege and Consent—Direct Benefit—Mechanics and Wage-Earners Lien Act*, R.S.O. 1914, ch. 140, secs. 2 (c), 8, 14.]—The appellants, owners of land, sold it to I., two of the conditions of sale being that I. should build upon the land according to plans and specifications prepared by or for him, and that the appellants should advance to him a certain sum of money for the construction of the buildings. The work was done and materials supplied by I.'s contractor and his subcontractors, and by workmen and tradesmen who sold materials to them. The appellants had noth-

ing to do with these contracts nor any control over the contractor, sub-contractors, or workmen or tradesmen:—*Held*, in an action for the enforcement of a mechanic's lien, brought by one of the tradesmen who furnished materials to I.'s contractor, that the appellants were in the position of mortgagees, by force of sec. 14 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, but were not owners within the meaning of "owner" as interpreted in sec. 2 (c)—the materials not having been furnished upon their request, credit, or behalf, or with their privity and consent, or for their direct benefit; and so they were without sec. 8, and within secs. 14 and 8 (3).—*Orr v. Robertson* (1915), 34 O.L.R. 147, explained. *Gearing v. Robinson*, (1900), 27 A.R. 364, specially referred to. *Marshall Brick Co. v. Irving*, 542.

MILEAGE PAYMENTS.

See HIGHWAY, 2.

MISCONDUCT.

See CONTEMPT OF COURT.

MISTAKE.

See CONTRACT, 5.

MORTGAGE.

Short Forms Act—Additional Covenants—Default in Payment of Interest and Taxes—Acceleration Clause—Relief against—Payment of Interest in Advance—Bonus—Penalty—Construction of Mortgage-deed—Power of Court to Relieve against Penal Provisions

—*Costs.*—Where a mortgage was made pursuant to the Short Forms of Mortgages Act, but contained additional covenants and provisions, it was *held*, that a provision for acceleration of the time for payment of the principal upon default as to any of the covenants or provisos was an addition to or qualification of the statutory covenant for acceleration upon default of payment of interest and for relief upon payment of arrears of interest, and the same addition or qualification should be read into the power to relieve, so that where default was made in respect of the covenant for payment of taxes, the mortgagors should, upon payment of taxes, be relieved from immediate payment of the principal.—And so as to a provision requiring the payment as an indemnity of three months' interest in advance, in addition to the payment of the arrears of interest: the mortgagors, being relieved from the consequences of default, upon payment of interest up to date, should not be required to pay a sum, in the nature of a penalty, for interest in addition to the future interest.—The Court has power to relieve against oppressive and unfair forfeiture.—*Kilmer v. British Columbia Orchard Lands Limited*, [1913] A.C. 319, and *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710, referred to.—The mortgagee was ordered to pay the costs of litigation occasioned by her unfounded claims.—Legislation in regard to mortgages similar to that protecting the holders of

fire insurance policies, in respect of additions to the statutory conditions, suggested. *Schwartz v. Williams*, 33.

See ASSIGNMENTS AND PREFERENCES—MECHANICS' LIENS, 2, 3.

MUNICIPAL CORPORATIONS.

1. *Local Option By-Law—Petition for Submission to Electors—Sufficiency of Number of Petitioners—Ascertainment—Duty of Council—Liquor License Act, R.S.O. 1914, ch. 215, sec. 137 (4)—Refusal to Submit By-law—Mandamus—Costs.*—By sec. 137, sub-sec. 4, of the Liquor License Act, R.S.O. 1914, ch. 215, it becomes the duty of the council of a municipality to submit a proposed local option by-law to the electors, if a petition in writing signed by at least 25 per cent. of the total number of persons qualified to vote is filed.—*Re Halladay and City of Ottawa* (1907), 15 O.L.R. 65, distinguished.—Upon the evidence, the petition presented in this case was sufficiently signed; and it was the duty of the council to submit the proposed by-law to the voters; the intention to refuse to discharge this duty abundantly appeared; and a mandamus should be issued directing the council and its members to submit the by-law.—The costs of the motion for the mandamus were ordered to be paid individually by the members of the council who voted against the motion. *Re Stratford Local Option By-law*, 26.

2. *Local Option By-law—Petition for Submission to Electors of Repealing By-Law—Liquor License Act, R.S.O. 1914, ch. 215, sec. 137 (4)—“Persons Qualified to Vote”—Ascertainment of Number on Voters’ List—Evidence—Persons Signing Petition—Percentage—Mandamus to Council—Status of Applicant—Officer of Corporation.*—Section 137 (4) of the Liquor License Act, R.S.O. 1914, ch. 215, provides for the submission by the council to the municipal electors of a local option by-law or (see sub-sec. (8)) a repealing by-law, if a petition “signed by at least 25 per cent. of the total number of persons appearing by the last revised voters’ list of the municipality to be qualified to vote at municipal elections” is filed with the Clerk:—*Held*, that in order to ascertain whether a petition duly filed is sufficiently signed, the number of persons who appear by the voters’ list to be qualified to vote is to be taken into consideration; if one-fourth of these persons have signed the petition, the statutory requirement is answered. The name of a person may be repeated once or oftener on the list, but that does not increase the number of persons.—The unimpeached affidavit of the applicant, upon a motion for a mandamus to the council to submit a repealing by-law, that the number of persons on the voters’ list was only 3,625, while there were in name 4,337, was accepted; and a mandamus was granted.—That the applicant was an officer

or servant (auditor) of the municipal corporation was considered unobjectionable. *Re Owen Sound Local Option By-law*, 48.

3. *Regulation of Petty Traders—Hawkers and Pedlars' By-law—Magistrate's Conviction—"Sale" of Coal Oil—Municipal Act, R.S.O. 1914, ch. 192, sec. 416—5 Geo. V. ch. 34, secs. 32, 33.*—The decision of MEREDITH, C.J.C.P., 34 O.L.R. 545, was reversed, and the convictions of two servants of an oil company for offences against a hawkers and pedlars' by-law of a county, quashed, upon the ground that the acts of the accused—obtaining from purchasers orders on the oil company to ship to the purchasers named quantities of oil, to be delivered at the places named in the orders, cash on delivery—did not constitute a "sale" within the meaning of the by-law, which followed the wording of sec. 416 of the Municipal Act, R.S.O. 1914, ch. 192, as amended by 5 Geo. V. ch. 34, secs. 32, 33.—*Rex v. St. Pierre* (1902), 4 O.L.R. 76, and *Rex v. Pember* (1912), 3 O.W.N. 1216, followed. *Re Garnham's Conviction, Re Richardson's Conviction*, 54.

4. *Regulation of Petty Traders—Transient Traders By-law of Town—Information for Offence against—Farmer Selling his own Produce—Municipal Act, R.S.O. 1914, ch. 192, sec. 420, cls. 6, 7—"Trader"—"Other Persons"—"Trading Persons."*—The legislation in this Province as to the regulation of petty traders has

been of uniform character from the earliest statute in 1816 (56 Geo. III. ch. 36) to its latest development in the Municipal Act, R.S.O. 1914, ch. 192; and the enactments as to hawkers, pedlars, and transient traders are *in pari materia*.—History, object, and scope of the legislation.—*Attorney-General v. Tongue* (1823), 12 Price 51, 60, 61, followed.—Throughout the whole course of legislation as to petty traders, exemption is made in express terms as to commodities which are the growth or produce of the Province; and the exemption extends to the dealings of persons who might otherwise be called temporary traders.—The words "other persons" in sec. 420, clauses 6 and 7, of the Municipal Act, R.S.O. 1914, ch. 192, mean other *trading* persons; and a farmer selling his own produce is not a trader.—A charge against a farmer of selling his own produce in a town, from a railway car by which it had been transported thither, contrary to a transient traders by-law of the town, which followed the wording of sec. 420, was *held* to have been properly dismissed by a magistrate. *Rex v. Geddes*, 177.

See BOND—CONTRACT, 5—
HIGHWAY—STREET RAILWAY.

MUTUAL DEBTS.

See CONTRACT, 4—SET-OFF.

NAME.

See COPYRIGHT.

NATURAL GAS.

See CONTRACT, 1.

NEGLIGENCE.

1. *Death of Person Operating Derrick—Negligence of Owner of Derrick—Negligence of Hirer of Derrick and Operator—Findings of Jury—Absence of Contributory Negligence and Voluntary Assumption of Risk—Master and Servant—Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3 (c)—Duty of Hirer to Operator—Failure to Provide Proper Superintendence and Effective System.*—The defendant steel company hired from the defendant paper company a derrick and its crew (engineer and fireman) to do work upon the premises of the steel company. In lifting an iron tank of the steel company, the derrick was overturned and fell, killing D., the engineer, who was operating it. The widow of D. brought an action against both companies to recover damages for his death, and the jury at the trial made findings in favour of the plaintiff against both companies:—*Held* (GARROW, J.A., dissenting), that there was no basis for the finding of the jury against the paper company, on the ground that it had supplied a machine lacking the proper equipment; *aliter*, if the paper company had been accurately informed as to the work to be done by the derrick, and had undertaken to supply a machine capable of doing it.—But (GARROW, J.A., dissenting) there was a duty on the part of the steel com-

pany so to direct or superintend the operation as to provide for the safety of those engaged in it, and to employ a system which would ensure the workmen, no matter whose servants they were, against injury; there was a breach of that duty; and, the jury having absolved D. from negligence, and there being no finding that he had voluntarily assumed the risk of the work, the steel company was liable. *Dube v. Algoma Steel Corporation Limited*, 371.

2. *Injury and Death by Explosion in Works of Steel Company—Electric Transformer—Supply of Electric Power—Hydro-Electric Power Commission of Ontario—Introduction of High Tension Wires—Explosion Caused by Failure to Make Proper Connections—Negligence of Foreman Employed by Commission—Absence of Contributory Negligence—Liability of Commission—Emanation from the Crown—Power Commission Act, 7 Edw. VII. ch. 19, sec. 23; R.S.O. 1914, ch. 39, sec. 16—Consent of Attorney-General to Commission being Added as Defendants—Implication—Power of Court to Give Judgment against Commission.*—An employee of the defendant company was killed and another employee was injured by an explosion in the transformer station of the defendant company. The administratrix of the estate of the deceased man brought an action against the defendant company under the Fatal Accidents Act to recover damages for his death; and the injured man sued for damages for

his injuries. The Hydro-Electric Power Commission of Ontario were added as defendants in both actions, upon the consent of the Attorney-General, after the commencement of the actions. The transformer in the station was the property of the defendant company. By arrangement with the defendant company, the Commission built an extension line and installed the equipment necessary to supply power for the defendant company's works. The high tension construction work was done under the superintendence of an engineer employed by the Commission. The cause of the explosion was the making of a wrong connection in bringing the high tension wires into the transformer; the connections were made by a man employed by the Commission as construction foreman, in the course of the work of which he was in charge:—*Held*, that the explosion occurred through the negligence of the employees of the defendant Commission, and that they were liable to both plaintiffs; and that there was no contributory negligence on the part of the deceased or the injured man.—*Held*, also, that, although the Commission were an emanation from or an agent of the Crown, and were not, by the Power Commission Act, 7 Edw. VII. ch. 19 (now R.S.O. 1914, ch. 39), created a corporation or body politic and corporate, yet, the consent of the Attorney-General to their being added as defendants, under sec. 23 of the original Act (sec. 16 of

the present Act), having been given, judgment might be pronounced against them.—*Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, and *Roper v. Public Works Commissioners*, [1915] 1 K.B. 45, distinguished. *Howarth v. Electric Steel and Metals Co. Limited*, *Young v. Electric Steel and Metals Co. Limited*, 596.

3. *Injury to Patient in Hospital*—*Carelessness of Nurse*—*Public Charitable Institution*—*Corporate Body*—*Liability*—*Contract to Nurse Patient*—*Master and Servant*—*Servant not under Orders of Surgeon*—*Respondeat Superior*—*Damages*.]—The judgment of BRITTON, J., 34 O.L.R. 216, was reversed, and it was *held*, that, as the defendants' express contract with the plaintiff was, *inter alia*, to nurse her, they were responsible as in contract for the negligence of the nurse in attendance upon the plaintiff whereby the plaintiff was injured—*respondeat superior*—since what the nurse did was in the course of her routine of duty as the servant of the defendants, and was not done under the orders of the surgeons who had operated upon the plaintiff.—*Hall v. Lees*, [1904] 2 K.B. 602, *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, and *Glavin v. Rhode Island Hospital* (1879), 34 Am. Reps. 675, 12 R.I. 411, specially referred to.—The funds of such a hospital as the defendants' are not now exempt from liability for damages upon the "trust fund" theory.—*Mersey Docks*

Trustees v. Gibbs (1866), L.R. 1 H.L. 93, followed. *Lavere v. Smith's Falls Public Hospital*, 98.

See MASTER AND SERVANT—RAILWAY—TRIAL.

NEW TRIAL.

See LIBEL—RAILWAY—TRIAL.

NONREPAIR OF BRIDGE.

See HIGHWAY, 1.

NOTICE.

See HIGHWAY, 1.

NOTICE OF MOTION.

See CONTEMPT OF COURT.

NOTICE TO REDEEM.

See ASSESSMENT AND TAXES, 2.

OBSTRUCTING PEACE OFFICER.

See CRIMINAL LAW, 4.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See ASSESSMENT AND TAXES, 1—HIGHWAY, 2—STREET RAILWAY.

OPTION.

See CRIMINAL LAW, 4.

PARENT AND CHILD.

Liability of Parent for Maintenance of Forisfamiliated Infant—Contract—Implication—Quantum Meruit.—The plaintiff cared for and maintained the defendant's infant son for a period of more than 12 years, the child when two years old going to live with the plaintiff and remaining

until he was taken away by the defendant, at the age of 15:—*Held*, upon the evidence, that some compensation was contemplated between the parties; there was an implied contract, enforceable at law, to pay a *quantum meruit*.—In fixing a sum to be paid by the defendant for the care and maintenance of his child, regard was had to the boy's services to the plaintiff upon his farm for 3 years before the withdrawal; the defendant having said at the beginning that if the boy remained for any length of time it would not be right to take him away when he became of use. *Latimer v. Hill*, 36.

See INFANT.

PARTIES.

See WILL, 1, 2.

PASSING-OFF.

See COPYRIGHT.

PATENT FOR INVENTION.

Validity—"Life of Patent"—Termination by Non-manufacture and Illegal Importation—Pleading—Action to Restrain Manufacturing or Selling in Breach of Contract—Defence—Amendment—Construction of Contract.—Patent Act, R.S.C. 1906, ch. 69, secs. 23, 38 (b).—The life of a patent is, in the absence of special circumstances, "the term limited for the duration:" sec. 23 of the Patent Act, R.S.C. 1906, ch. 69.—The mere occurrence of the circumstances set out in the proposed amended defence in this case—an action to restrain the

infringement of a patent—did not bring the life of the patent to an end within the meaning of the agreement; and, as to the alleged importation, the patent might be in existence *quoad* any one but the importer: sec. 38(b).—*Semble*, that if the patent were declared void by a judgment *in rem* of a Court of competent jurisdiction, the “life” would be considered to have come to an end. *Berliner Gramophone Co. Limited v. Pollock*, 137.

PEACE OFFICER.

See CRIMINAL LAW, 4.

PEDLARS.

See MUNICIPAL CORPORATIONS, 3.

PENALTY.

See MORTGAGE.

PERPETUITIES.

See CONTRACT, 1.

PETTY TRADERS

See MUNICIPAL CORPORATIONS, 3, 4.

PLANS.

See STREET RAILWAY.

PLEADING.

See DISCOVERY—LIBEL—PATENT FOR INVENTION.

POLICE MAGISTRATE.

See CRIMINAL LAW, 3, 4.

POSSESSION OF LAND.

See LIMITATION OF ACTIONS.

POWER COMMISSION ACT.

See NEGLIGENCE, 2.

PRACTICE.

See APPEAL—COMPANY, 2—CONTEMPT OF COURT—DISCOVERY—DIVISION COURTS—LUNATIC—SOLICITOR—TRIAL—WRIT OF SUMMONS.

PREFERENCES.

See ASSIGNMENTS AND PREFERENCES.

PREFERENTIAL LIEN.

See LANDLORD AND TENANT, 2.

PRINCIPAL AND SURETY.

See BOND—PROMISSORY NOTE—SALE OF GOODS, 1.

PROHIBITION.

See DIVISION COURTS, 2.

PROMISSORY NOTE.

Consideration—Debt of Infant—Guaranty—Suretyship—Contract—Primary Liability.]—A girl of 18, the sister of the defendant, made an arrangement with the plaintiff to purchase from her a millinery business and stock in trade; the infant was let into possession, and the plaintiff gave her a bill of sale of the goods and an assignment of the lease. The purchase-money was to be paid, out of the infant's own money, by her brother; but, after a delay, the brother refused to pay, and the plaintiff threatened to take back her property; subsequently the plaintiff desisted from her threat, on receiving from the defendant, who was the infant's

elder sister, and of full age, a guaranty to pay the rent and a promissory note made by the defendant in favour of the plaintiff for part of the purchase-money; the infant remained in possession and carried on the business; she was not a party to the note. In an action upon the note:—*Held*, that the defendant was liable.—*Harris v. Huntbach* (1757), 1 Burr. 373, *Mutual Loan Fund Association v. Sudlow* (1858), 5 C.B.N.S. 450, and *Wauthier v. Wilson* (1912), 28 Times² L.R. 239, applied. *Pearson v. Calder*, 524.

See CONTRACT, 4—SALE OF GOODS, 1.

PUBLIC CHARITABLE INSTITUTION.

See NEGLIGENCE, 3.

PUBLIC LANDS ACT.

See CROWN LANDS.

PUBLIC PLACE.

See CRIMINAL LAW, 2.

QUANTUM MERUIT.

See PARENT AND CHILD.

RAILWAY.

Injury to Person at Highway Crossing — Negligence — Contributory Negligence—Written Findings of Jury—Explanation of Foreman Orally in Court-room on Interrogation by Trial Judge—Effect of—Failure to Ring Bell or Sound Danger-whistle—Evidence—New Trial.—In an action for damages for injuries sustained by the plaintiffs by being run into

by an engine of the defendants when attempting to cross the track in a buggy, the jury made findings in favour of the plaintiffs; but the action was dismissed by the trial Judge:—*Held* (RIDDELL, J., dissenting), that the oral statement of the foreman in the Court-room ought not to be taken as overriding the deliberate-written verdict of the whole jury; and that verdict should stand.—*Held*, also, that, although there was no statutory duty to sound the whistle within 550 feet from the crossing, failure to do so might well be negligence; and the jury were within their rights in finding that the plaintiffs' injuries were caused by the neglect of the defendants to sound the whistle, in the peculiar circumstances of the case.—*Held*, also, that the finding of the jury that the plaintiffs were not guilty of contributory negligence could not be said, upon the evidence, to be a finding which reasonable men could not conscientiously make.—*Held*, also, that the defendants were not entitled to a new trial; and that judgment should be entered for the plaintiffs for the damages assessed by the jury.—*Jones v. Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331, specially referred to. *Gray v. Wabash R.R. Co.*, 510.

See EVIDENCE—TRIAL.

RATIFICATION.

See BANKS AND BANKING, 1.

REGISTRY LAWS.

See MECHANICS' LIENS, 2.

REGULATION OF PETTY TRADERS.

See MUNICIPAL CORPORATIONS, 3, 4.

RELEASE.

See DEED.

RENEWAL OF WRIT.

See WRIT OF SUMMONS.

RENT.

See LANDLORD AND TENANT, 1, 3.

RESCISSION.

See CONTRACT, 5—VENDOR AND PURCHASER.

RESTORATION.

See CONTRACT, 5.

RESULTING TRUST.

See TRUSTS AND TRUSTEES.

REVIVAL OF ACTION.

See WRIT OF SUMMONS.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 183.]—See CONTEMPT OF COURT.

Rule 184.]—See CONTEMPT OF COURT.

Rule 298.]—See CONTEMPT OF COURT.

Rule 388.]—See HUSBAND AND WIFE.

Rule 501 (1).]—See TRIAL.

Rule 689.]—See SOLICITOR.

SALE OF ANIMAL.

Warranty—Breach—Contract—Findings of Jury—"Unsoundness."—When the vendor of an

animal agrees to give a written warranty of soundness, he necessarily (1) asserts that the animal is sound, and (2) promises to give his assurance in writing. It is of no importance that the warranty is not reduced to writing—Equity looks upon that as done which should have been done; and an action will lie for breach of the warranty of soundness, if the animal turns out to be unsound.—In the circumstances of this case, it was *held*, that the original contract was still in existence, unmodified, and that the vendee was entitled to recover damages for breach of the warranty.—*Head v. Tattersall* (1871), L.R. 7 Ex. 7, explained and applied.—The unsoundness, to give an action on the warranty, must be existent at the time of sale—and that, upon the evidence, was the case here.—A malformation of a horse's foot may be an unsoundness. *Cameron v. McIntyre*, 206.

SALE OF GOODS.

1. *Conditional Sale of Machine*—Contract—Provisions of—Property not to Pass until Price Paid—Sale in Default of Payment and Application of Proceeds upon Notes Given for Price—Liability of Guarantor of Notes—Possession of Machine Taken by Vendor under Earlier Contract for Sale of Land and Machinery—Retention of Machine and Use in Business—Inability to Hand over Security Unimpaired—Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 9—Fixture—Waiver—Discharge of Surety.]—The plaintiff agreed to

sell a brick-yard and plant and machinery to a brick company, the deed to be held in escrow until payment of the purchase-price. The brick company took possession under the agreement, and, for the purpose of making bricks, bought from the plaintiff a new machine, to replace one that had been sold with the brick-yard. The sale was upon the terms of a conditional sale contract, by which the property in the machine was not to pass until the price was paid. This stipulation was added to each of two promissory notes given for the price. The defendant guaranteed the payment of the notes. The notes each contained a provision that upon default in payment of the notes the plaintiff should be at liberty to take possession of and sell the machine and apply the proceeds upon the notes, after deducting costs of repossessing and selling. The machine was annexed to and became part of the realty; and, default having been made by the company in payment of the price of the land, etc., the plaintiff took possession of the land, and, with it, possession of the machine. He operated the yard, and in doing so used the machine as an integral part of the plant, treating it as his own property:—*Held*, by MIDDLETON, J., that the plaintiff could not recover that which was in truth the price of the chattel sold, because his conduct had been inconsistent with his obligations as vendor—the use he had made of the machine was not contemplated by the contract, and was inconsistent with his

obligation to hold it ready for delivery.—Upon appeal by the plaintiff, a Divisional Court of the Appellate Division was divided in opinion, and the judgment of MIDDLETON, J., stood as if affirmed. *Crane v. Hoffman*, 412.

2. *Lumber in Esse at Time of Contract—Inspection—Acceptance—Deduction for Excess of Inferior Grade—Caveat Emptor—Condition—Election—Breach of Warranty.*—The plaintiff had a quantity of lumber, of various grades, manufactured and piled; the defendant company agreed to buy the pile at a price named, subject to “national inspection,” delivery to be f.o.b. at D. The lumber was inspected there, loaded on cars, and shipped to a sub-purchaser. In an action to recover a balance of the price, the defendant company set up that more of a certain kind of lumber was in the quantity accepted and shipped than, under the terms of the agreement, the defendant was obliged to take, and claimed a reduction:—*Held* (HODGINS, J.A., dissenting), that this contention was concluded by the inspection and delivery at D.; the goods were *in esse* from the beginning of the negotiations; and the rule *caveat emptor* applied to exclude implied warranties. The inspection, followed by the acceptance and shipment, settled all other questions, both of quantity and quality.—*Jones v. Just* (1868), L.R. 3 Q.B. 197, 202, and *Towers v. Dominion Iron and Metal Co.* (1885), 11 A.R. 315, followed. — PER HODGINS,

J.A.:—The defendant company voluntarily precluded itself from the remedy of rejection, and was entitled to sue for damages as for a breach of warranty: *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394. *Oldrieve v. G. C. Anderson Co. Limited*, 396.

See CONTRACT, 4—DIVISION COURTS, 2.

SALE OF LAND.

See ASSESSMENT AND TAXES, 2
—CONTRACT, 4, 5—SALE OF GOODS, 1—VENDOR AND PURCHASER.

SCHOOLS.

See CONTEMPT OF COURT.

SECURITY.

See CHATTEL MORTGAGE.

SEPARATE SCHOOLS.

See CONTEMPT OF COURT.

SEPARATION OF HUSBAND AND WIFE.

See INFANT.

SERVICE OF WRIT.

See WRIT OF SUMMONS.

SET-OFF.

“Mutual Debts”—*Unconnected Transactions*—*Judicature Act, sec. 126*—*Rights of Assignee of one Debt*—*Assignment of Chose in Action Subject to “Equities”*—*Conveyancing and Law of Property Act, sec. 49.*—A debt of R. to B. and a debt of B. to R. (arising out of unconnected transactions) were both due and payable before the date at which B., for value, assigned to K. his

claim against R.; both claims were disputed and were in litigation, and the exact amount due upon either had not been in any way ascertained:—*Held*, that this did not prevent these claims being “mutual debts” and as such liable to be set off: *Ontario Judicature Act, R.S.O. 1914, ch. 56, sec. 126.*—The assignee has no greater right than the assignor—where there is the statutory right to set off, the assignee takes a claim against which there is a valid legal defence, which is one of the “equities” to which the right of an assignee of a chose in action is subject: *Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 49.*—There is another equity, sometimes called “set-off”, but not depending upon the statute, which arises when the claims are upon the same contract or are so interwoven by the dealings between the parties that the Court can find that there has been established a mutual credit, or an agreement, express or implied, that the claims should be set one against the other; and this equity also attaches to the claim in the hands of an assignee. *Burman v. Rosin, Rosin v. Burman*, 134.

See CONTRACT, 4.

SETTLEMENT DUTIES.

See CROWN LANDS.

SHARES AND SHAREHOLDERS.

See BANKS AND BANKING, 1, 2
—COMPANY—CONTRACT, 2—DISCOVERY—EXECUTORS AND ADMINISTRATORS, 2.

SHERIFF.

See SOLICITOR.

SHERIFF'S DEED.

See CROWN LANDS.

SHERIFF'S SALE.

See CREDITORS RELIEF ACT.

SOLICITOR.

Lien for Costs—Money Paid into Court by Garnishee—Creditors Relief Act, R.S.O. 1914, ch. 81, secs. 5 (1), 6 (2)—Costs of Attachment Proceedings—Priority—Costs of Action in which Judgment Recovered by Attaching Creditor—Rule 689—Right to Equitable Interference of Court—Lien on Client's Ratable Share of Fund to be Distributed by Sheriff.]—The solicitors for the plaintiff, who had recovered judgment for him against the defendant, and had, by attachment proceedings founded upon the judgment, secured payment into Court of a sum of money owed by the garnishee to the judgment debtor, were *held* entitled to payment thereof of their costs of the attachment proceedings, but not of their costs of the action in which the judgment was recovered; the balance, after payment of the costs of the attachment proceedings, was to be distributed by the sheriff in accordance with the Creditors Relief Act, R.S.O. 1914, ch. 81, secs. 5 (1), 6 (2).—The fund never having been in the possession or control of the solicitors, they had no lien upon it.—*Bell v. Wright* (1895), 24 S.C.R. 656, distinguished and commented on.

—*Mercer v. Graves* (1872), L.R. 7 Q.B. 499, specially referred to.—And the solicitors had not established a right to the equitable interference of the Court under Rule 689.—*Semble*, that they would be entitled to a lien upon their client's ratable share of the fund. *Dales v. Byrne*, 495.

SPECIFIC PERFORMANCE.

See TRUSTS AND TRUSTEES—VENDOR AND PURCHASER.

STATUTE OF FRAUDS.

Moneys Advanced by Director of Company—Oral Promise of President to Repay—Evidence—Nature of Contract.]—The decision of MIDDLETON, J., 34 O.L.R. 210, was reversed, and it was *held*, that the promise made by the defendant G. to repay to the plaintiff moneys advanced by the latter for the benefit of the defendant company, was an express contract of G.'s own and only his own, and was not a promise to answer the debt of the company so as to let in the Statute of Frauds.—*Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17, applied and followed. *Brown v. Coleman Development Co.*, 219.

See CONTRACT, 3.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

56 Geo. III. ch. 36 (U.C.) (Petty Traders).
See MUNICIPAL CORPORATIONS, 4.
C.S.C. 1856, ch. 66 (Railway Act).
See STREET RAILWAY.

- 40 Vict. ch. 84 (O.) (Metropolitan Street Railway).
See STREET RAILWAY.
- 50 Vict. ch. 21, sec. 1 (1) (O.) (Infants Act).
See INFANT.
- 56 Vict. ch. 94 (O.) (Metropolitan Street Railway).
See STREET RAILWAY.
- R.S.O. 1897, ch. 28, secs. 19, 31, 37 (Public Lands Act).
See CROWN LANDS.
- R.S.O. 1897, ch. 51, sec. 34 (Judicature Act).
See HUSBAND AND WIFE.
- R.S.O. 1897, ch. 51, sec. 38.
See WILL, 2.
- R.S.O. 1897, ch. 224, sec. 28 (1) (Assessment Act).
See ASSESSMENT AND TAXES, 1.
- 60 Vict. ch. 92 (O.) (Metropolitan Street Railway).
See STREET RAILWAY.
- 1 Edw. VII. ch. 33 (O.) (Toll Roads Expropriation Act).
See HIGHWAY, 2.
- 4 Edw. VII. ch. 23, secs. 122, 142, 144, 165, 172, 173 (O.) (Assessment Act).
See ASSESSMENT AND TAXES, 2.
- R.S.C. 1906, ch. 29, secs. 12, 13, 14, 15, 125, 132, 157 (Bank Act).
See BANKS AND BANKING, 2.
- R.S.C. 1906, ch. 29, sec. 125.
See BANKS AND BANKING, 1.
- R.S.C. 1906, ch. 37 (Railway Act).
See EVIDENCE.
- R.S.C. 1906, ch. 69, secs. 23, 38 (b) (Patent Act).
See PATENT FOR INVENTION.
- R.S.C. 1906, ch. 70, sec. 4 (Copyright Act).
See COPYRIGHT.
- R.S.C. 1906, ch. 144 (Winding-up Act).
See COMPANY, 3.
- R.S.C. 1906, ch. 144, sec. 71.
See CONTRACT, 4.
- R.S.C. 1906, ch. 144, sec. 101.
See BANKS AND BANKING, 1—COMPANY, 2.
- R.S.C. 1906, ch. 144, sec. 110.
See BANKS AND BANKING, 2.
- R.S.C. 1906, ch. 146, sec. 169 (Criminal Code).
See CRIMINAL LAW, 4.
- R.S.C. 1906, ch. 146, sec. 205.
See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, secs. 227, 228.
See CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, sec. 417 (c).
See CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 146, sec. 443.
See CRIMINAL LAW, 5.
- R.S.C. 1906, ch. 146, secs. 773 (e), 778.
See CRIMINAL LAW, 4.
- 7 Edw. VII. ch. 19, sec. 23 (O.) (Power Commission Act).
See NEGLIGENCE, 2.
- 8 Edw. VII. ch. 48, sec. 1 (O.) (Municipal Amendment Act).
See HIGHWAY, 2.
- 2 Geo. V. ch. 31, secs. 110-115 (O.) (Companies Act).
See COMPANY, 3.
- 2 Geo. V. ch. 53, sec. 5 (4) (O.) (Traction Engine Act).
See HIGHWAY, 1.
- 3 & 4 Geo. V. ch. 6, secs. 16, 44 (1) (O.) (Public Lands Act).
See CROWN LANDS.
- 3 & 4 Geo. V. ch. 43, sec. 460 (1) (O.) (Municipal Act).
See HIGHWAY, 1.
- R.S.O. 1914, ch. 39, sec. 16 (Power Commission Act).
See NEGLIGENCE, 2.
- R.S.O. 1914, ch. 56, sec. 3 (Judicature Act).
See WILL, 2.
- R.S.O. 1914, ch. 56, sec. 16 (b).
See LIMITATION OF ACTIONS.
- R.S.O. 1914, ch. 56, sec. 126.
See CONTRACT, 4—SET-OFF.
- R.S.O. 1914, ch. 62, sec. 19 (Surrogate Courts Act).
See EXECUTORS AND ADMINISTRATORS, 1.
- R.S.O. 1914, ch. 63, sec. 62 (1) (d) (Division Courts Act).
See DIVISION COURTS, 1.
- R.S.O. 1914, ch. 75 (Limitations Act).
See LIMITATION OF ACTIONS.
- R.S.O. 1914, ch. 81, secs. 5 (1), 6 (2) (Creditors Relief Act).
See SOLICITOR.
- R.S.O. 1914, ch. 81, sec. 6.
See CREDITORS RELIEF ACT.
- R.S.O. 1914, ch. 102 (Statute of Frauds).
See STATUTE OF FRAUDS.
- R.S.O. 1914, ch. 102, sec. 2.
See CONTRACT, 3.
- R.S.O. 1914, ch. 109, sec. 49 (Conveyancing and Law of Property Act).
See SET-OFF.
- R.S.O. 1914, ch. 124 (Registry Act).
See MECHANICS' LIENS, 2.
- R.S.O. 1914, ch. 134 (Assignments and Preferences Act).
See LANDLORD AND TENANT, 2.
- R.S.O. 1914, ch. 134, sec. 9.
See ASSIGNMENTS AND PREFERENCES.
- R.S.O. 1914, ch. 135, secs. 5, 6 (Bills of Sale and Chattel Mortgage Act).
See CHATTEL MORTGAGE.

R.S.O. 1914, ch. 136, sec. 9 (Conditional Sales Act).

See SALE OF GOODS, 1.

R.S.O. 1914, ch. 140, secs. 2 (c), 6, 12 (1), (2) (Mechanics and Wage-Earners Lien Act).

See MECHANICS' LIENS, 1.

R.S.O. 1914, ch. 140, secs. 2 (c), 8, 14.

See MECHANICS' LIENS, 3.

R.S.O. 1914, ch. 140, secs. 2 (c), 8 (3), 14, 21.

See MECHANICS' LIENS, 2.

R.S.O. 1914, ch. 146, sec. 3 (c) (Workmen's Compensation for Injuries Act).

See NEGLIGENCE, 1.

R.S.O. 1914, ch. 146, sec. 9.

See WRIT OF SUMMONS.

R.S.O. 1914, ch. 153, sec. 2 (1) (Infants Act).

See INFANT.

R.S.O. 1914, ch. 155, sec. 38 (1) (Landlord and Tenant Act).

See LANDLORD AND TENANT, 2.

R.S.O. 1914, ch. 156, sec. 4 (Appportionment Act).

See LANDLORD AND TENANT, 2.

R.S.O. 1914, ch. 178, secs. 118, 119, 121 (Companies Act).

See COMPANY, 1.

R.S.O. 1914, ch. 185, secs. 105 (8), 260 (1) (Railway Act).

See STREET RAILWAY.

R.S.O. 1914, ch. 192, sec. 416 (Municipal Act).

See MUNICIPAL CORPORATIONS, 3.

R.S.O. 1914, ch. 192, sec. 420 (6), (7).

See MUNICIPAL CORPORATIONS, 4.

R.S.O. 1914, ch. 195, sec. 40 (1) (Assessment Act).

See ASSESSMENT AND TAXES, 1.

R.S.O. 1914, ch. 215, sec. 137 (4) (Liquor License Act).

See MUNICIPAL CORPORATIONS, 1, 2.

4 Geo. V. ch. 25, secs. 2 (1) (f), 4, 5, 9, 10, 13, 15 (O.) (Workmen's Compensation Act).

See MASTER AND SERVANT.

5 Geo. V. ch. 34, secs. 32, 33 (O.) (Amending Municipal Act).

See MUNICIPAL CORPORATIONS, 3.

STREET RAILWAY.

Agreements with Municipal Corporations — Construction — C.S.C. ch. 66—Ontario Statutes 40 Vict. ch. 84, 56 Vict. ch. 94, 60 Vict. ch. 92—Ontario Railway Act, R.S.O. 1914, ch. 185, secs. 105 (8), 260 (1)—Right of Devia-

*tion from Highway—Approval of Plans—Order of Ontario Railway and Municipal Board—Jurisdiction—Submission of Plans to Municipal Officials—Necessity for.]—*An order of the Ontario Railway and Municipal Board allowing an application made by the railway company for the approval of certain plans of tracks by way of deviation from its existing line along Yonge street in the city of Toronto, to a proposed station on land adjoining that street—the *locus* having been annexed to the city of Toronto in 1908—was reversed on appeal, upon the ground—according to the opinion of the majority—that no plan of the proposed deviation was ever submitted to or approved by the municipal officials of either the county or the city.—The decision of FALCONBRIDGE, J., in *City of Toronto v. Metropolitan R.W. Co.* (1900), 31 O.R. 367, and the decision of the Privy Council in *Toronto and York Radial R.W. Co. v. City of Toronto* (1913), 25 O.W.R. 315, applied. *Re Toronto and York Radial R. W. Co. and City of Toronto*, 57.

See HIGHWAY, 2.

SUMMARY CONVICTION.

See CRIMINAL LAW, 4.

SURETY.

See BOND—PROMISSORY NOTE — SALE OF GOODS, 1.

SURRENDER.

See CONTRACT, 1—LANDLORD AND TENANT, 1, 3.

SURROGATE COURTS.

See EXECUTORS AND ADMINISTRATORS, 1.

TAX SALE.

See ASSESSMENT AND TAXES, 2.

TAXES.

See ASSESSMENT AND TAXES.

TENDER.

See CONTRACT, 2—VENDOR AND PURCHASER.

TERRITORIAL JURISDICTION.

See DIVISION COURTS, 2.

TESTAMENTARY CAPACITY.

See WILL, 1, 2.

TIME.

See CRIMINAL LAW, 1.

TITLE TO LAND.

See LIMITATION OF ACTIONS.

TOLL ROAD.

See HIGHWAY, 2.

TOLL ROAD EXPROPRIATION ACT.

See HIGHWAY, 2.

TOTAL DISABILITY.

See INSURANCE.

TRACTION ENGINE ACT.

See HIGHWAY, 1.

TRADER.

See CRIMINAL LAW, 1—MUNICIPAL CORPORATIONS, 3, 4.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, 4.

TRIAL.

Findings of Jury—Negligence—Contributory Negligence—Injury to Servant of Railway Company—Conflicting Findings—New Trial—Rule 501 (1).—

In an action for damages for injuries sustained by a locomotive fireman employed by the defendants, by reason of the escape of steam from a valve in the locomotive engine, the jury found, in answer to questions: (1) that the injuries of the plaintiff were caused by the negligence of the defendants; (2) that such negligence consisted in not seeing that the valve was properly closed; (3) in answer to the question "*Or were the plaintiff's injuries the result of his own negligence?*"—"No;" (5) that the plaintiff, by the exercise of reasonable care, could have avoided the accident; (6) that he could have done so "*by examining valve:*"—*Held*, that there was evidence proper to be submitted to the jury on all branches of the case; and (RIDDELL, J., dissenting) that the answers of the jury were conflicting, and there should be a new trial: Rule 501 (1). *Ball v. Wabash R.R. Co.*, 84.

See CRIMINAL LAW, 4—DIVISION COURTS, 2—LIBEL—RAILWAY.

TRUSTS AND TRUSTEES.

Conveyance of Interest in Land to Relative—Consideration—Promise of Grantee to Make Settlement for Benefit of Grantor—Present Trust—Resulting Trust—Interest of Grantor—Specific Performance—Equitable Relief

upon Condition of Doing Equity—Will—Legacy—Disclaimer—Election.—The defendant conveyed all her undivided half interest in certain lands to her uncle, in consideration of his agreement to pay her, during her life, one-half of the rents of the property, less any disbursements, and after her death to convey one moiety of the property itself to her heirs. This was to be secured, in part at least, by a will which he was to make in her favour. He predeceased her, without settling the property, or devising it to her, but by his will he gave her a legacy of \$20,000. The defendant asserted a trust in her favour in respect of the property conveyed:—*Held*, that by the conveyance all the interest of the defendant, legal or equitable, was intended to pass; and it was impossible to impute to the parties any intention of creating a trust *in presenti*.—*Held*, also, that there was no resulting trust, for there was a consideration which from its nature could not entirely fail.—*Semble*, that the conveyance was, having regard to the relationship of the parties, originally voidable in a court of equity.—One who covenants for value to settle land may be called a trustee for the objects in whose favour the settlement is to be made; but only on the assumption that the contract would in a court of equity be enforced specifically.—*Fremoult v. Dedire* (1718), 1 P. Wms. 429, and *Howard v. Miller*, [1915] A.C. 318, explained and applied.—Treating the contract as one capable of specific performance, and the de-

fendant as seeking that equitable relief, she must herself be willing to do what was equitable: even if the original agreement had not been afterwards varied by mutual consent—as was contended—it could be specifically performed only if the defendant was willing to disclaim the legacy; and she was, therefore, put to her election; the other parties to the action being willing that she should take either a moiety of the property or the legacy, as she might prefer. *Snider v. Carleton, Central Trust and Safe Deposit Co. v. Snider*, 246.

See ASSIGNMENTS AND PREFERENCES.

UNDERTAKING TO TELL FORTUNES.

See CRIMINAL LAW, 5.

UNDUE INFLUENCE.

See DEED—WILL, 2.

VENDOR AND PURCHASER.

Agreement for Sale of Land—Vendor's Lack of Title—Knowledge of Purchaser—Failure to Repudiate Promptly—Approbation—Tender of Balance of Purchase-money and Mortgage Executed by Purchaser—Refusal of Vendor—Infancy of Purchaser—Want of Knowledge of Vendor—Inability to Create Valid Security on Land—Condition Precedent—Rescission—Conduct of Infant Purchaser—Assumption of Ownership—Specific Performance—Costs.—A purchaser may, on discovering the vendor's lack of title, repudiate the contract of

purchase and sale; but he must do so with reasonable promptness. Where the purchaser knew of the defect, and thereafter himself tried to sell the land, made payments on it, tendered a mortgage made by himself upon it, and in all things acted as though the contract was valid, it was not open to him to repudiate on the ground of the vendor's lack of title.—The vendor must be in a position to make a good conveyance at the date fixed for completion—a conveyance by himself and not another.—*Murrell v. Goodyear* (1860), 1 D.F. & J. 432, and *In re Bryant and Birmingham's Contract* (1890), 44 Ch.D. 218, followed.—What the defendant contracted for was a document which would give him security on the land, which the mortgage tendered did not; the plaintiff was unable to perform a condition precedent, and that was fatal to his claim for rescission based upon the provision of the contract.—The plaintiff could not, on the strength of his infancy, recover the moneys paid by him; he became the “potential owner” of the land, listed it for sale, tried to sell it, and acted as the owner.—*Short v. Field* (1915), 32 O.L.R. 395, followed.—Specific performance of the contract was awarded in favour of the plaintiff on payment of all costs. *Robinson v. Moffatt*, 9.

See CONTRACT, 4, 5—SALE OF GOODS, 1.

VERDICT.

See LIBEL.

VOLUNTARY ASSUMPTION OF RISK.

See MASTER AND SERVANT—NEGLIGENCE, 1.

VOLUNTARY DEED

See DEED.

VOTERS' LISTS.

See MUNICIPAL CORPORATIONS, 2.

WAIVER.

See CONTRACT, 3—SALE OF GOODS, 1.

WARRANTY.

See SALE OF ANIMAL—SALE OF GOODS, 2.

WARRANTY OF FITNESS FOR HABITATION.

See LANDLORD AND TENANT, 3.

WAY.

See HIGHWAY.

WILL.

1. *Action to Establish*—*Due Execution*—*Testamentary Capacity*—*Evidence*—*Onus*—*Insane Delusion not Affecting Testator's Dispositions*—*Finding of Fact of Trial Judge*—*Appeal*—*Authority of Decided Cases*—*Parties*—*Judgment*—*Persons Interested not before Court.*—In an action to establish a will, against opposition based upon the alleged mental incapacity of the testator, the onus is, in the first place, upon him who propounds that will, but that onus is sufficiently satisfied by proof of the execution of the will in the manner required by law, by an apparently com-

petent testator; and the onus then shifts to him who opposes the will; that onus is in turn satisfied by proof of an insane delusion; and then the onus shifts back to the propounder of the will—the onus of proof sufficient to satisfy the conscience of the Court that the dispositions of his property made by the testator in the will were not affected by the insane delusion.—It was proved that the testator was subject to an insane delusion; but the trial Judge found that the dispositions made by the testator were not affected thereby, and admitted the will to probate; and, upon appeal, the Court declined to interfere with that finding upon a question of fact, no error in law being shewn.—A finding of fact in one case cannot have any binding effect in any other case, except by way of estoppel.—The will bore testimony against the contention that it was made as it was because of the testator's insane delusion.—*Skinner v. Farquharson* (1902), 32 S.C.R. 58, referred to.—The judgment was binding only between the parties and could not prejudicially affect any person interested not before the Court. *Beament v. Foster*, 365.

2. *Action to Set aside after Probate Granted* — *Judicature Act*, R.S.O. 1897, ch. 51, sec. 38; R.S.O. 1914, ch. 56, sec. 3—*Want of Testamentary Capacity*—*Undue Influence*—*Onus of Proof*—*Suspicious Circumstances Surrounding Execution of Will*—*Shifting of Onus*—*Finding of Fact of Trial Judge* — *Authority of Decided*

Cases—Reasonableness of Disposition made by Testator—Parties—Rights of Beneficiaries not before Court—Costs.]—The grant by a Surrogate Court of letters probate of a will does not stand in the way of a determination by the Supreme Court of Ontario of the questions involved in an action in which the will is attacked on the grounds of want of testamentary capacity and undue influence: *Judicature Act*, R.S.O. 1897, ch. 51, sec. 38; R.S.O. 1914, ch. 56, sec. 3.—The plaintiff, one of two sons of the testator, attacking the will, admitted *primâ facie* its existence, and so did away with further formal proof of its execution and all that flowed from that proof; but, when suspicious circumstances attending the execution were shewn, the onus was shifted, and it lay upon him who obtained the execution of the writing to satisfy the conscience of the Court that it contained and expressed the last will of the deceased.—And held, that the defendants had not satisfied that onus.—No two cases of wills are exactly alike; a finding of fact in one case is not binding in any other case in which it does not operate as an estoppel.—The disposition which a testator makes in his will may afford evidence for or against the validity of the will; but no person is required to make a will such as others may think reasonable or proper; and the onus upon those supporting the will does not include shewing that the disposition made is a reasonable and proper one.—*Adams v. McBeath* (1897), 27 S.C.R. 13,

considered and distinguished.—The will in question, in so far as it conferred any benefit upon any party to the action, was not the will of the deceased; but this did not affect the rights of beneficiaries under the will who were not parties.—Consideration of question of costs. *Lloyd v. Robertson*, 264.

3. *Legacies — Insufficiency of Assets to Pay all in Full—Legacy to Creditor in Satisfaction of Debt but of Larger Amount than Debt—Abatement with other Legacies.*—The principle by which a legacy given in satisfaction of dower is entitled to priority, and does not abate upon a deficiency of assets, is inapplicable to the case of a legacy given in satisfaction of an ascertained debt.—Where a testator bequeathed to his physician the sum of \$1,500 “in full settlement for his services during the past five years,” and it appeared that the amount due for these services was only \$300, and that there was a deficiency of assets to pay all the legacies, it was *held*, that the legacy to the physician must abate *pari passu* with the other legacies.—*In re Wedmore*, [1907] 2 Ch. 277, approved and followed. *Re Rispin*, 385.

See TRUSTS AND TRUSTEES.

WINDING-UP.

See BANKS AND BANKING, 1, 2
—COMPANY, 2, 3—CONTRACT, 4.

WITNESSES.

See EVIDENCE.

WORDS.

“*Actual Value.*”]—See ASSESSMENT AND TAXES, 1.

“*Borrowed.*”]—See CONTRACT, 2.

“*Due.*”]—See LANDLORD AND TENANT, 2.

“*During.*”]—See LANDLORD AND TENANT, 2.

“*Equities.*”]—See SET-OFF.

“*In the Presence of one or more Persons.*”]—See CRIMINAL LAW, 2.

“*Lent.*”]—See CONTRACT, 2.

“*Life of Patent.*”]—See PATENT FOR INVENTION.

“*Literary Composition.*”]—See COPYRIGHT.

“*Mutual Debts.*”]—See CONTRACT, 4—SET-OFF.

“*Other Persons.*”]—See MUNICIPAL CORPORATIONS, 4.

“*Owner.*”]—See MECHANICS’ LIENS, 2, 3.

“*Passing off.*”]—See COPYRIGHT.

“*Persons Qualified to Vote.*”]—See MUNICIPAL CORPORATIONS, 2.

“*Place to which Public Permitted to have Access.*”]—See CRIMINAL LAW, 2.

“*Sale.*”]—See MUNICIPAL CORPORATIONS, 3.

“*Services of Workman Temporarily Let or Hired to Another.*”]—See MASTER AND SERVANT.

“*Set-off.*”]—See SET-OFF.

“*Shareholder.*”]—See BANKS AND BANKING, 2.

“*Term Limited for the Duration.*”]—See PATENT FOR INVENTION.

“*Total Disability.*”]—See INSURANCE.

“*Trading Persons.*”]—See MUNICIPAL CORPORATIONS, 4.

"Unsoundness."—See SALE OF ANIMAL.

"Wilfully."—See CRIMINAL LAW, 2.

WORK AND LABOUR.

See MECHANICS' LIENS.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See NEGLIGENCE, 1.—WRIT OF SUMMONS.

WRIT OF SUMMONS.

Failure to Serve—Renewal after Expiry of Year—Limitation of Actions—Workmen's Compensation for Injuries Act, sec. 9—Revival of Action after Statutory Bar—Claim at Common Law not Barred—Effect of—Right to Bring New Action.—Where, owing to the expiry of the writ of summons, a cause of action has become barred by a statute of limitation, leave to renew the writ *nunc pro tunc* ought not to be granted.—*Doyle v. Kaufman* (1877), 3 Q.B.D. 7, 340, and *Hewett v. Barr*, [1891] 1 Q.B.

98, followed.—The action was brought at common law and under the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, to recover damages for injury sustained by the plaintiff while in the employment of the defendant company. The cause of action (if any) under the Act was barred at the expiration of "six months from the occurrence of the accident causing the injury" (sec. 9), unless kept alive by the issue and renewal of the writ of summons.—After the writ had expired, no valid service having been effected, an order was made for its renewal, and it was renewed and served; but the order and the renewal and service were set aside.—*Semble*, that no case was made for renewing the writ, even if a renewal would be permitted to revive a cause of action which had become barred.—And *held*, that the fact that the common law cause of action was not barred afforded no reason for allowing that to be done which would revive the cause of action that was barred. The plaintiff would have the right to bring a new action at common law. *Travato v. Dominion Cannery Limited*, 295.



